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IN THE

Supreme Court of the United States

JACK RUBIN, ALEX MOSKOVIC, DAVID MERMELSTEIN, IRENE MERMELSTEIN, FRED TAUCHER, HANS LINDENBAUM, HANNA HARELI, and DAVID GRINSTEIN,

Petitioners,

v.

ASSICURAZIONI GENERALI S.p.A HOLOCAUST INSURANCE LITIGATION, SAMUEL HERSLY, AGNES HEYMAN, PAOLA OREFFICE KULP, and EUGENIA SCHENCKER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SAMUEL J. DUBBIN, P.A.
DUBBIN & KRAVETZ, LLP
1200 Anastasia Avenue
Suite 300
Coral Gables, Florida 33134
Telephone: (305) 357-9004
Facsimile: (305) 371-4701

Attorneys for Petitioners

219891

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

In exchange for benefits to the class that are minimal at best and illusory at worst, Settling Plaintiffs agreed to release all insurance claims of Holocaust survivors and their family members against Defendant Assicurazioni Generali, S.p.A. Under a generous assumption of the settlement's benefits, Generali will end up paying fewer than 6,000 of the 110,000-150,000 policies it sold to European Jews before WWII. Therefore, the overwhelming majority of the class members will have their rights foreclosed without any chance to receive a benefit under the settlement. The settling parties value the settlement at $35 million. The estimated minimum value of the policies that will remain unpaid is $2 billion. [SJA-81-82].[1]

The settlement is based, and adopts as legally final, the results of the International Commission for Holocaust Era Insurance Claims (ICHEIC). The insurers created ICHEIC in 1998 to be a voluntary tribunal in which companies would publish policy names and process claims using "relaxed standards" of proof, in a "nonadversarial" process. It was not binding unless

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[1] Economist Sidney J. Zabludoff, who consulted for the Jewish organizations in the International Commission for Holocaust Era Insurance Claims (ICHEIC), so stated in declarations filed below, A-230-31, SJA-77-86; A-347; A-463-65; SJA-79 and in testimony before the U.S. Congress. *See, e.g.* Statement of Sidney J. Zabludoff, "Holocaust Insurance Accountability Act of 2007," House of Representatives Committee on Financial Services, Feb. 7, 2008 (Zabludoff Statement), *http://www.house.gov/apps/list/hearing/financialsvcs_dem/press020708.shtml.*

a claimant accepted an offer. Generali and other companies entered the process pursuant to "agreements" limiting their total exposure without regard to the number or current values of unpaid policies. The policy values offered via ICHEIC were discounted far below true economic value.

ICHEIC accepted claims and inquiries through its deadline of December 2003. When it finished processing claims and closed in March 2007, ICHEIC had paid less than 3% of the $17 billion 2007 value of insurance policies owned by European Jewish families in 1938. [A- 230-31].

Originally there was no relationship between the Generali litigation and ICHEIC. But the settlement reached in August 2006 incorporated ICHEIC, as it was winding down, such that Generali would (1) pay claims that had been filed before the December 2003 deadline but which, if approved, would exceed the original $100 million limit, and (2) process "new claims" filed within a new four month window, using the eligibility criteria similar to (with valuations lower than) ICHEIC's.

Petitioners contend the settlement is unfair because it makes ICHEIC retroactively binding on all Generali insureds, beneficiaries, and heirs, the vast majority of whom will have their claims released for no consideration. This is unfair in principle, as ICHEIC was no more than a private administrative settlement mechanism of the kind this Court has rejected in *Amchem Products, Inc., v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fireboard Corp.*, 527 U.S. 815 (1999). The

unfairness of the settlement is exacerbated by ICHEIC's well-documented shortcomings in handling claims, publishing names, and other failures to treat claimants fairly.

Finally, granting of the writ requested presents no risk to those who might actually benefit from the settlement. Recently, to blunt progress of legislation to help survivors in Congress, Generali informed two Congressional committees that it will accept and process *any* claims according to ICHEIC standards, without regard for the class settlement filing deadline.[2] Therefore, this Court can assume jurisdiction over the case and correct the due process violations created by the settlement without harming any claimant who chooses to pursue a Generali claim using ICHEIC standards.

The issues presented are:

1. Whether the settlement violates Rule 23 and due process by releasing the claims of tens of thousands of Generali policyholders, beneficiaries, and heirs who have no opportunity to receive a benefit under the settlement;

2. Whether the settlement fails to satisfy Rule 23 (a) and (b) certification requirements of typicality, adequacy of representation, predominance, commonality, and superiority, under the standards of *Amchem* and *Ortiz*;

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[2] Letter from Assicurazioni Generali, S.p.A., to the Honorable Bill Nelson, Chairman, International Operations and Organizations, Democracy and Human Rights Subcommittee, Senate Committee on Foreign Relations, May 8, 2008.

3. Whether the class notice was adequate under Rule 23 and due process;

4. Whether the settling plaintiffs and Class Counsel adequately represented the interests of the class as a whole.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The litigation involving Generali has generated several decisions. The ones directly relevant to this petition are the following:

The District Court's February 27, 2007 Final Order and Judgment approving the fairness of the settlement agreement, reproduced herein as Appendix D (17a-23a).

The Second Circuit's October 2, 2007 Summary Order vacating and remanding the District Court's February 27, 2007 decision, reproduced herein as Appendix C (13a-16a).

The District Court's January 7, 2008 Final Order and Judgment approving the fairness of the settlement after the remand by the Second Circuit, reproduced herein as Appendix B (6a-12a).

The Second Circuit's June 6, 2008 Summary Order affirming the District Court's January 7, 2008 Final Order and Judgment, published as *Rubin v. Assicurazioni Generali, S.p.A.*, __ Fed. Appx. __, 2008 WL 2329321 (2d Cir. (N.Y.) (Jun 06, 2008), and reproduced herein as Appendix A (1a-5a).

The Second Circuit's September 15, 2008 Order Denying Petitioners' Petition for Panel Rehearing or Rehearing *En Banc*, reproduced herein as Exhibit E (24a-25a).

JURISDICTION

The Second Circuit issued its Summary Order on June 6, 2008. Petitioners timely moved for Panel Rehearing or Rehearing *En Banc*, which were denied on September 15, 2008. This Court has jurisdiction pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

This petition raises federal questions arising under the Fifth and Seventh Amendments of the United States Constitution and Federal Rule of Civil Procedure 23. The particular provisions of Rule 23 at issue are Rule 23(a):

> "One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class;"

Rule 23(c)(2)(B):

> "For any class certified under Rule 23(b)(3), the court must direct to class members the best notice [which] must concisely and clearly state in plain, easily understood language: . . . that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and the binding effect of a class judgment on class members under Rule 23(c)(3);"

Rule 23(e)1)(A): "The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class;" Rule 23(e)(1)(B): "The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate."

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be . . . deprived of life, liberty, or property without due process of law . . . ." The Seventh Amendment to the United States Constitution provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

STATEMENT OF THE CASE[3]

The Petitioners, Jack Rubin, Alex Moskovic, David Mermelstein, Irene Mermelstein, Fred Taucher, Hans Lindenbaum, Hanna Hareli, and David Grinstein are all Holocaust survivors who lived in countries where Generali and its affiliates sold insurance prior to WWII. They applied to ICHEIC to recover insurance benefits from policies purchased by their parents and grandparents, and their claims were either denied or ignored for several years without resolution.

Generali is a one of the largest insurance companies in the world today, as it was prior to and during WWII. It was founded by Jewish merchants in Italy in 1831. Through its Trieste headquarters, European branches, and over 100 subsidiaries and affiliates, Generali aggressively marketed insurance to European Jews, especially in the countries of the former Austro-Hungarian Empire and Germany. After World War II, as Holocaust survivors and their families struggled to reconstruct their lives, Generali dishonored its obligations by demanding original policy documents and death certificates, denying the existence of policies or records, claiming its assets were nationalized, asserting statutes of limitations, and other fraudulent denials that frustrated Holocaust survivors and the heirs of Holocaust victims.

In the 1990s, after public disclosures about the thefts that abetted the Holocaust, survivors began speaking

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[3] References to the circuit court record are based on the appendices filed in the Second Circuit, Appeal No. 07-1380-cv, as follows. A- refers to the Joint Appendix; SUP- refers to the Supplemental Appendix of Plaintiffs-Appellants; and SJA- refers to the Supplemental Joint Appendix.

about family insurance policies. In 1997 and 1998, State insurance regulators and Congress held several hearings on the subject. Generali was one of the most commonly cited companies, as survivors recalled seeing papers or nameplates on buildings with Generali's signature winged Griffin (Lion of Judah) insignia, also a well-known Jewish symbol. After the war, survivors asked Generali to make good on the promises made to their loved ones, promises made in the face of growing evil. These were *insurance* policies, to *insure* their families' uncertain futures by paying a solid and respectable company like Generali. Yet the survivors also recounted the dismissive treatment they received from Generali and other insurers when trying to redeem the promises that Generali and others had made, and broken.

In 1998 and 1999, several states responded by passing laws requiring insurers to publish the names of policy holders from the Holocaust period and to pay claims, or else be subjected to lawsuits by rightful beneficiaries and heirs.

ICHEIC Formed to Protect Insurers

In 1998, in light of these developments, insurers created the International Commission for Holocaust Era Insurance Claims, or "ICHEIC." Under ICHEIC, insurers joined with state regulators and certain NGOs (not survivor groups or claimants' attorneys) to deal with the problem on a non-binding, "non-adversarial" basis. The values that ICHEIC determined would be paid for policies were politically determined through a negotiation, and policies from Germany and Eastern Europe were highly discounted.[4] ICHEIC was always understood by participants to be voluntary for all parties, unless an offer was made and accepted.

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[4] Zabludoff Statement, note 1, at 2-3.

ICHEIC was chartered under Swiss law and headquartered in London to avoid the reach of U.S. public records laws and judicial subpoena powers. It was funded by the insurers. Its meetings were conducted in secret and no minutes were published. Generali joined ICHEIC under an agreement which, as far as was publicly disclosed, limited the company's exposure to $100 million. ICHEIC was to be governed by "consensus," which Generali interpreted to mean it could reject any ICHEIC decision which it regarded as "unfair or unjust." *In re Assicurazioni Generali, S.p.A. Holocaust Insurance Litig.*, 228 F. Supp. 2d 348, 357 (S.D.N.Y. 2002) ("*Generali I*").

Litigation Against Generali.

In the late 1990s, survivors and heirs filed four civil "class actions" against Generali, two in the U.S. District Court for the Southern District of New York, and two in California State Court. Other individual cases were filed in California, Florida, New York, and Wisconsin. They were removed and transferred to the Southern District of New York by the Panel on Multidistrict Litigation. *Generali I*, 228 F. Supp. 2d 348, 349 n.1.

In 2001, Generali moved to dismiss the coordinated lawsuits to in favor European courts, or alternatively, resolution by ICHEIC. The District Court denied the motion, finding ICHEIC "clearly unsatisfactory." It held the insurers controlled the commission through its funding power and control over decisions, and called ICHEIC "the company store." *Generali I*, 228 F.Supp.2d at 355-57.

ICHEIC's tenure was tumultuous. It was criticized in the media and Congressional hearings between 2000 and 2003.[5] In 2003, Congress required the State Department to collect information on companies' claims practices and results, an obligation ICHEIC refused to comply with to this day.[6]

When ICHEIC closed its doors in March 2007, it had paid $250 million of the $17 billion in outstanding values of life/annuity/endowment policies estimated to

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[5] In 2002, Congressman Henry Waxman wrote:

> "Holocaust survivors have been waiting decades to reclaim Holocaust-era insurance policies. Unfortunately, the findings of an ongoing congressional investigation I initiated indicate that their wait is far from over. . . . The main cause of the failure to resolve claims appears to be the actions — and the inaction — of insurance companies. The majority of the companies that have agreed to the ICHEIC process have not lived up to their obligation to disclose policyholder lists. The ICHEIC member companies also appear to have wrongfully rejected, undervalued or left unanswered the claims of many survivors."

[6] *See* State Department Bureau of European and Eurasian Affairs, "Report to Congress: German Foundation "Remembrance, Responsibility, and the Future," March, 2006.: "The Department requested additional information from ICHEIC in an effort to meet the reporting requirements of Section 704(a)(3)-(7). ICHEIC Chairman Lawrence Eagleburger responded that he would not provide the Department of State any information regarding ICHEIC's undertakings."

be owned by European Jews in 1938. Generali had paid about $120 million on some 4500 policies, leaving over 100,000 policies uncompensated, with a 2007 value of at least $2 billion. SJA-77-86.

Garamendi Decision and Subsequent Dismissal of Plaintiffs' Cases.

In June 2003, in *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003) this Court held California's statute requiring insurers to disclose information about Holocaust-era insurance policies to the Insurance Department was preempted by Executive Branch policy, exemplified by executive agreements between the U.S. and Germany and Austria calling for their insurance companies to join ICHEIC. *Id.*, at 401-08, 420-23.

On October 14, 2004, the District Court in the Generali MDL granted Generali's renewed motion to dismiss. It held that under *Garamendi*, Executive policy supporting ICHEIC preempted survivors' state law claims against Generali, even though there was no executive agreement between the U.S. and Italy, and no evidence that U.S. foreign policy extended to opposing litigation against Generali. *In re Assicurazioni Generali, S.p.A. Holocaust Insurance Litig.*, 340 F.Supp.2d 494 (S.D.N.Y. 2004) ("*Generali II*").

All Plaintiffs appealed the District Court's October 2004 decision. On August 25, 2006, the lawyers in the New York class actions entered into a settlement agreement with Generali.[7]

[7] Several plaintiffs with pending appeals opted out of the settlement, Appeal Nos. 05-5602, 5612, et al. The Second Circuit (Con'td)

The Settlement

The settlement makes ICHEIC retroactively binding on all survivors and heirs with possible claims against Generali or its affiliates. It provides for Generali to (1) process and pay previously filed ICHEIC claims that were timely filed but not processed before Generali reached the $100 million level;[8] and (2) process "new claims" within a four-month period after the settlement. The settlement papers do not describe the status of the settling plaintiffs' (the "class representatives") claims against Generali, nor their ICHEIC experiences. The settlement also provided that Generali would be released as to all Holocaust Era insurance claims (except for opt-outs), and the class action will be "dismissed with prejudice." [A-52-75].

(Con'td)

held oral argument on their appeals on June 10, 2008, after which the Panel wrote a letter to the State Department asking "whether court adjudication of these Holocaust era claims against Generali would conflict with the foreign policy of the United States." August 1, 2008 letter from Catherine O'Hagan Wolfe to the Honorable Conoleezza Rice. The State Department did not file a statement of interest, but the Department of Justice filed an ambiguous letter brief responding to the Court's inquiry, which the parties are now addressing. That briefing will be completed by January 15.

[8] Although Generali entered into a secret side agreement with ICHEIC that appears to say it will pay claims in excess of $100 million, A-615, there is correspondence from ICHEIC officials treating the limit as real. SJA-180. The burden to resolve this issue is on the settling parties. *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1126 (7th Cir. 1979).

Generali reviewed some 50,000 ICHEIC claims or inquiries between 1997 and 2007. It issued formal denials to 5,570 individuals, and made 4,568 offers. Notorious among the denials were cases in which Generali admitted that the claimants' family member purchased a Generali policy, but asserted the policy was paid or lapsed before 1936, even though Generali said it had no documentation of these transactions.

The 5,570 claimants who received formal denials have no chance to benefit from the settlement, which effectively makes prior denials legally binding. The 40,000-50,000 claimants who received no formal answer also have no chance of benefitting under the settlement, because if they resubmitted their claims with no new evidence, they would be denied again. Tens of thousands of policy holders whose families bought Generali policies but who either did not learn about ICHEIC at all, or who searched in vain because family names in company records were not published, or were published late, might not receive any benefit either, but all their claims will be released.

Petitioners Rubin, Taucher, Moskovic, Lindenbaum, and David and Irene Mermelstein challenged the settlement on numerous grounds, including the adequacy of the notice and other Rule 23 and due process concerns. The District Court approved the settlement on February 27, 2007. App-D; 17a-23a. On October 2, 2007, the Second Circuit vacated and remanded the District Court's decision because individual notice was not provided to claimants whose names were known to Generali. App.- C; 13a-16a.

On remand, the District Court rejected Petitioners' suggestions for a notice that clearly informed class members whose claims had been denied that their rights against Generali would be terminated if they did not exclude themselves. [SJA-8]. The Court instead approved the notice proposed by Class Counsel, which did not warn specifically that the settlement would be binding on a former unsuccessful claimant who submitted a new claim without additional proof. SJA-22.

After the new notice was disseminated, the original objector-appellants objected again, joined by two other class members, Hanna Hareli and David Grinstein of Israel.[9] They objected to the notice language, and the unfairness of the settlement that involuntarily imposed ICHEIC's unfair decisions on class members. They also argued that the notice was confusing, in that it included a claim form but not an opt out form, creating a natural pull suggesting to class members — including many who are elderly and speak foreign languages — that the Court endorsed the settlement and they had nothing to lose by filing a claim form. SJA-181-83.[10]

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[9] Approximately 50 class members had excluded themselves from the initial settlement, and an additional 256 class members filed opt-outs from the second notice.

[10] The December 2007 objections included information that emerged *after* the District Court's initial settlement approval that further contradicted many of the settling parties' representations in support of the settlement. [SJA-20]. As the amicus curiae law professors supporting the objectors to the Amchem settlement noted: "When settlement agreement can turn fiction into fact, there can be nothing left of the constraints imposed by Rule 23. 1997 WL 13605, at *3.

After a fairness hearing on January 7, 2008, the District Court again approved the proposed settlement as fair, reasonable, and adequate under Rule 23. [SJA-1-5]. The Court again said the deal was the only practical chance that some class members might have to see any money from Generali, dismissing the possibility of reversal in the appeal of the original dismissals, as well as the progress of legislation in Congress to reverse the effect of the *Garamendi* decision on survivors' insurance claims. SJA-65.[11]

Petitioners argued that the settlement unfairly releases tens of thousands of claims for no consideration, in exchange for the miniscule benefits for a few class members. The settling parties contended the releases were necessary in order to induce Generali to re-open the "new claims" claims window. Yet it was recently disclosed that in order to blunt the legislation in Congress, Generali promised two Congressional committees (and confirmed to the Second Circuit) *that it will continue to process claims, under ICHEIC standards notwithstanding the ICHEIC's conclusion and the deadlines of the class settlement.* Hence, the releases, and the settlement itself, are *completely unnecessary*, highlighting the due process violations caused by the judgment below.[12]

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11 Holocaust survivors, today the only U.S. citizens who cannot sue an insurance company that dishonors an insurance policy, are perplexed that their current government has failed them, but are fighting for restoration of their rights. *See www.hsf-usa.org.*

[12] *http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:41176.pdf.*, at 180.

REASONS FOR GRANTING THE PETITION

The settlement will release of *tens of thousands* of Holocaust survivors and heirs of Holocaust victims with possible claims against insurance giant Assicurazioni Generali, S.p.A. ("Generali"), for no consideration. The mechanism for this miraculous escape from liability is the retroactive imposition of ICHEIC on claimants, known and unknown, who cannot recover any benefit under the settlement agreement. This kind of settlement violates well-settled precedent in this Court and in the circuit courts of appeal.

With conservative estimates that Generali sold 110,000 such policies that were in force in 1938, the ICHEIC results show fewer than 5,000 paid to date. Even if the "new claims" process of the settlement is successful pay an additional 1,000 claims (higher than class counsel's estimate), it would leave over 95 percent of the policies Generali sold to Holocaust victims unaccounted for – over 100,000 policies worth $2 billion. In contrast, the estimated value of the settlement is $35 million.

This settlement is a device to limit Generali's downside exposure if the District Court's 2004 dismissal of plaintiffs' cases is reversed by the Second Circuit, or if legislation is enacted clarifying federal law to allow survivors and heirs access to courts. It resembles the administrative settlement this Court has condemned in *Amchem* and *Ortiz* and that other federal circuits have similarly rejected because the circumstances do not satisfy the normal certification criteria of Rule 23, and because the claims of the vast majority of class members are wiped out for no consideration, by inadequate class representatives and class counsel, and without adequate notice.

In addition, the class notice was inadequate because it failed to apprise class members, especially those whose previous ICHEIC or Generali claims had been denied, that their rights against Generali would be eviscerated if they did not choose to exclude themselves from the settlement. In failing to so advise the class, the District Court in effect became a settlement advocate, in violation of its duty to protect the interests of absent class members.

Finally, there was a lack of adequate representation by the settling plaintiffs and class counsel. Class counsel abandoned a strong appeal of the initial dismissals of the claims under *Garamendi*, even though there has been no executive agreement between the U.S. and Italy, and no evidence that the U.S. policy cited by the Court in *Garamendi* extended to Generali. After being sharply critical of ICHEIC for years, Class Counsel effusively embraced ICHEIC as a framework for the settlement, despite evidence of its failures.

I. The Settlement Violates Due Process and Rule 23 By Compromising Claims For No Consideration.

Petitioners urge this Court to take jurisdiction of this case and hold that the settlement below, imposing ICHEIC mandatorily on all class members when the vast majority did not choose to be bound by it, and compromising the claims of most class members for no consideration, renders the settlement is invalid under *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 860-61 (1999); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591,

612 (1997), and cases from other circuits rejecting class settlements in which portions of the class were required to relinquish their rights for no benefit.

The scheme approved will release claims versus Generali by individuals such as Appellants who applied to ICHEIC in good faith and whose claims were arbitrarily denied without any opportunity for them to rebut Generali's denials with evidence they may have had in their records. It makes ICHEIC legally binding even though Petitioners and other claimants did not agree to be bound by it. The class action mechanism is not designed nor allowed to impose by compulsion, after the fact, a "settlement process" of a private, secret, foreign-based, star chamber system, unregulated by any court of governmental authority, established with an arbitrarily set limit on the funds available, and controlled by the entities who profited from betraying the promises made to Petitioners' parents, Holocaust victims no less.

Petitioners are typical of class members who tried to access ICHEIC after its creation in 1998, and whose claims were denied for reasons that they can not verify or trust. They had no ability to discover records or put Generali under oath, which is not consistent with the due process they would receive in a court with discovery, cross-examination, sworn testimony, and other safeguards. They clearly have no opportunity to benefit from the settlement, but would give a release to Generali based on a process they did not agree would be legally binding.

This includes class members whose Generali-ICHEIC claims were denied under the "negative evidence" rule, such as Petitioner Hanna Hareli. She is a Holocaust survivor from Israel (originally from Czechoslovakia). Generali did not dispute that her uncle, Jakob Weisz, purchased policy number 119,188 from the its Czech office in 1930. However, it denied her claim stating that its records in 1936 did not include any evidence that the policy was in force.

ICHEIC accepted Generali's contention that it lacked records to show what happened to the policy, but allowed it to deny the policy anyway. Rather than relaxing the burden for survivors, ICHEIC gave Generali greater protection than would U.S. courts, where the burden of proving the defense of payment is on the insurer.

Similarly, Petitioner Jack Rubin has no possibility of receiving any benefit under the settlement. His family was forcibly removed from their home in Vari, (Czechoslovakia, later Hungary) in April of 1944 and taken to the Beregsastz Ghetto, and then deported to Auschwitz, where his parents perished. When he returned from the camps, the family home and business were destroyed and he could not locate any records. In 2000, he informed ICHEIC that his family home and his father's general store had a sign affixed stating they were insured by "Generali Moldavia," [SUP-41]. His ICHEIC claim even identified the name of the agent, Joseph Schwartz, who "did not survive the Holocaust." *Id.*

Generali acknowledged that Generali Moldavia was its property insurance subsidiary in Hungary, but denied payment, admitting "the archives of the Generali company did not contain the water copies of the policies issued by subsidiaries." ICHEIC upheld the denial of any life insurance claim without demanding any records such as data on common customers between Generali Moldavia and any life insurance branch or subsidiary, or records about agents such as "Joseph Schwartz."[13] In court, Mrs. Hareli and Mr. Rubin (and the other petitioners) would have the benefit of discovery and sworn testimony to pursue their claims.

The decision below conflicts with well-settled precedent in this Court and in other circuits. *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 860-61; *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 612 (1997) (Rule 23 "must be interpreted in keeping with the . . . Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge, or modify any substantive right. 28 U.S.C. Section 2071(b)"); *Mirfashi v. Fleet Mortgage Corp.*, 356 F.3d 781, 783-785 (7th Cir. 2004) (Posner, J.) (reversing settlement where one of the classes "received absolutely nothing, while surrendering all of its claims against" the defendant);

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[13] Petitioners Alex Moskovic (who identified relatives' names on the ICHEIC website), David and Irene Mermelstein, Fred Taucher, Hans Lindenbaum, and David Grinstein, were either denied with the notation "no match found," or did not receive any final response but were told ICHEIC would keep searching.

Molski v. Gleich, 318 F.3d 937, 955 (9th Cir. 2003) (reversal because consent decree released almost half the absent class members' claims with little or no compensation); *In re General Motors Corp. Pick Up Truck Fuel Tank Products Litig.*, 55 F.3d at 808 (reversing coupon settlement in a case which likely provided no value to many class members, including lower income class members); *Piambino v. Bailey*, 610 F.2d 1306, 1329 (5th Cir. 1980) (invalidating settlement as to class members who received no payments from the settlement fund); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 1995 WL 222177 (E.D.La 1995) (settlement disapproved because claims of plaintiffs who no longer drove Broncos would be extinguished for safety information of little or no value to them.); *Petruzzi's, Inc. v. Darling-Delaware Co., Inc.*, 880 F. Supp. 292, 299 (M.D.Pa. 1995)(rejecting settlement that benefited a subsection of the class in which 50% of the class would not receive premium certificates but would have their claims against defendant released).

Petitioners argued to the Second Circuit that in addition to *Amchem* and *Ortiz*, the settlement violated the rule of *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir. 1981). The court rejected that argument on the ground that "there is no cap on the amount to be allocated among class members, and the ability to establish a valid claim constitutes the factual predicate for both the claims being released and claims being compensated." App. 4a. In this respect, the Court misconstrued Petitioners'

argument, which is that a court cannot impose on class members the results of a private settlement apparatus controlled and funded solely by the companies, retroactively eliminating the vast majority of class members' rights for no consideration.

The Court also misapprehended the Petitioners' argument in another respect, dismissing the argument that the settlement unfairly denies recovery to previously unsuccessful claimants because those class members "would not be barred" from submitting "new claims." But the reason prior claimants cannot benefit from the settlement is not because they cannot submit new claims. It is because it would be futile for them to try. Without new evidence, which virtually no Holocaust survivors have, the opportunity to resubmit a claim that will undoubtedly be denied is, by definition, no benefit.

Another group of class members whose claims would be released without the chance of receiving any benefit are those who lack knowledge of any possible claim due to the unique circumstances of the Holocaust, Generali's concealment of facts from policyholders and heirs for decades, and Generali's incomplete publication of policy holder names via ICHEIC. To the extent these "unknowing" class members have not filed claims, they are analogous to the exposed-only class members in *Amchem* whose injuries had not yet manifested.

As the Third Circuit noted in *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 622 (3rd Cir. 1996), the "futures class action with no delayed opt-out rights,

notice to absent class members cannot meet the requirements of Rule 23 or the Constitution," as futures plaintiffs, inter alia, "may not know that they have been exposed to asbestos, even if aware of their exposure, have little reason to pay attention to class action announcements, and even if they find out about the class action, they lack adequate information to properly evaluate whether to opt out of the settlement."

Similarly, class members in this case with no knowledge of a Generali policy are similarly disadvantaged. They likely know they were part of a family affected by the Holocaust, but their relatives may have passed away without telling them about family policies. They might have looked on the ICHEIC website and seen nothing for their families because Generali published only a fraction of its names. Even if they received a notice, they might not understand that by receiving a claim form that Generali has only committed to matching names against the same database that yielded the partial disclosures, so when they submit the claim they are possibly signing away their rights against Generali. This is not adequate notice under Rule 23.

Another category of class member whose rights would be extinguished for no consideration, in violation of the principles of *Amchem*, *Ortiz*, *Mirfashi*, *Molski*, *and GM Pick Up Truck Fuel Tanks*, and *Piambino*, are people, estimated in this record to number in the tens of thousands, whose relatives bought policies from a former or current Generali subsidiary or affiliate. The definition of releasees under the settlement agreement includes "the Generali Group," which includes not only

Assicurazioni Generali, S.p.A. and its branch offices, but several dozen listed subsidiaries in Exhibit B to the Settlement Agreement *and their* subsidiaries and affiliates as well. SJA-32-33. But the claims processing mechanism agreed to by the Settling parties, the Policy Information Center (PIC), does not include the names of the policy holders of the subsidiaries and affiliates, or entities Generali acquired after WWII. A-347. That does not mean the information is not available; it just is not part of the settlement. So, class members whose family members bought policies from these entities will not benefit, but their claims would be released.

II. The settlement failed to satisfy Rule 23 (a) and (b) certification requirements of typicality, adequacy of representation, predominance, commonality, and superiority, under the standards of *Amchem* and *Ortiz*.

The ICHEIC system, with its arbitrary financial limits and lack of protections for most claimants, resembles in many material respects the kind of settlement scheme this Court has held violative of Rule 23 when done under court auspicies in *Amchem* and *Ortiz*. It follows that such a process having been conducted privately, cannot be accepted *after the fact* as a settlement mechanism under Rule 23.

Given the uneven and arbitrary treatment of claimants, the retroactive imposition of releases on individuals who had every reason to believe ICHEIC was voluntary even if a claim was denied, imposition of releases on people who would have no information, the

inadequacy of the notice to the "sprawling and amorphous class," if the District Court had examined this settlement from the certification standpoint, rather than simply as "a settlement," he would have found structural conflicts and other impediments to typicality, predominance, commonality, superiority, and adequacy of representation, and should have rejected this settlement. *E.g., In re General Motors Corp. Pick-Up Fuel Tank Products Liability Litig.*, 55 F.3d 768 (3rd Cir. 1995).

This settlement is similar to *Amchem* and *Ortiz,* as a way to salvage something for Class Counsel after the case had been dismissed, and a way for Generali to protect its downside in the event the *Generai II* decision is overturned.

The ICHEIC process incorporated into the settlement shares many of the very same procedural and substantive defects this Court has held violate Rule 23 and due process in *Amchem* and *Ortiz.* Those settlements were vacated even though conceived and supervised by the honest and careful efforts of U.S. district courts. ICHEIC was private, and controlled by Generali and the other companies, and the settlement was teed up by the settling parties for the federal court's imprimatur after Generali's "private settlement" system was nearly wrapped up. This Court has held such schemes violate Rule 23.

In *Ortiz*, there were three distinctive characteristics of a claims process historically accepted by the drafters

of Rule 23 as acceptable for class treatment in a "limited fund" case. The first was that the total of the fund available for satisfying aggregated liquidated claims had to be inadequate to pay all the claims. Second, the whole of the inadequate fund was to be devoted to the overwhelming claims. 527 U.S. at 839. ("The limited fund cases thus ensured that the class as a whole was given the best deal; they did not give a defendant a better deal than seriatim litigation would have produced."). Third, the claimants with common theories of recovery were "treated equitably among themselves." *Id.*, at 840 ("Once the represented classes were so identified, there was no question of omitting anyone whose claim shared the common theory of liability and would contribute to the calculated shortfall of recovery.").

By incorporating ICHEIC, this settlement must be judged by the same standards, and it would fail all three elements of the *Ortiz* test. First, the amount of funds the companies supposedly made available through ICHEIC were artificially limited. When Generali joined ICHEIC its exposure was "agreed" to be capped at $100 million. But Generali is solvent, to say the least. It should not be treated like an estate in which the corpus of funds available was limited, as *Ortiz* requires.

In normal litigation, beneficiaries and heirs would have had access without limitation to Generali's treasury for payment of a fair value for policies plus punitive damages if warranted. Instead, ICHEIC established artificially low values for Generali and other policies, and ICHEIC officials pressured appellate arbitrators to

deny Generali claims because of the perceived limits in the pool of funds.[14]

The second criterion is equally skewed. Far from making sure that the class "as a whole" got the best recovery possible from the available funds, the opposite happened. The values offered to ICHEIC claimants, especially for the countries in Eastern Europe and Germany where Generali and its affiliates did business, were below their true values. German policies were paid at 15% of the rates of other West European countries, and the East European valuation rate set by ICHEIC was about "one-third of the conservative realistic current value." Zabludoff Statement, at 2, 3.

The very purpose of ICHEIC was to give insurance companies a better deal than seriatum litigation might have yielded for plaintiffs, with the supposed benefit of easing claimants' burdens as well. This was precisely the kind of formula this Court rejected in *Ortiz* due to the failure of the parties to satisfy Rule 23 certification requirements.

Third, the class members were not treated equitably among themselves. Only a fraction of Generali's policy holders' names were published, thereby arbitrarily limiting the ability of claimants to get payments. While

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[14] The irregularity of the procedure approved below is precisely what the *Amchem* objectors warned about to this Court: "Any tortfeasor could impose an administrative compensation scheme on its future victims by orchestrating a nationwide class action with the cooperation of compliant plaintiff attorneys." 1997 WL 13208, at *35.

some claimants received offers, others like Petitioners were subjected to arbitrary and inconsistent results that defined ICHEIC, or they never even learned about a family policy. ICHEIC was the antithesis of a system where equals were treated equally.

As this Court held in *Ortiz*, "this structure obviously implicates the Seventh Amendment jury trial rights" of absent class members," and so does the settlement structure under review. 527 U.S. at 846.

If ICHEIC were presented to a district court before the fact today with all its facts known, no court could approve it under *Ortiz*. It is no more worthy of being a settlement vehicle after-the-fact under Rule 23, and logically should be less so, when created and controlled by the defendant with the understanding that it would only apply if accepted by the claimants, yet now it is being retroactively imposed on unwilling class members.

III. The Notice Violates Due Process and Rule 23.

The Notice fails to satisfy due process and Rule 23 because it does not fairly and accurately apprise potential class members of their rights under the settlement, including the right of class members to object, to exclude themselves, and that they will be bound by the settlement if they do not exclude themselves. *Amchem*, 521 U.S. 591, 628 (1997) (class notice must provide class members with information "needed to decide intelligently, whether to stay in or

opt out.");[15] *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1227-28 (11th Cir. 1998) ("the notice must also contain information reasonably necessary to make a decision to remain a class member and be bound by the final judgment or opt out of the action") (quoting *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1105 (5th Cir. 1977).

The Notice devised by the settling parties was confusing to the members of the class who will be releasing Generali if the settlement is approved, because most would not understand that prior ICHEIC denials will be legally binding on them, and their rights against Generali would be extinguished. Petitioners urged the Court to require a statement immediately after the sentence about new claims on the summary page, stating: "If your previous claim was denied or you received a "humanitarian payment" of $1,000 from ICHEIC, and you do not have any new information to support a new claim, your rights against Generali will likely be terminated under the settlement unless you follow the steps to exclude yourself."

However, the District Court rejected Petitioners' suggestion, accepting instead language from the settling parties, which stated simply that "any class member may submit a Claim Form even if a prior claim form was

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[15] Under *Amchem* it is doubtful that even the new notice ordered by the Second Circuit could be effective as to this "amorphous and undefined" group.

denied by ICHEIC. However, it is likely the claim will be denied again unless the Claim Form includes new information."

Petitioners also argued that the language of the Claim Form wrongly implied that claims may be validated based on anecdotal information, even though Generali's practice under ICHEIC had been to deny claims unless *both* (a) the applicant or Generali has documentary record of a claim, *and* (b) Generali determines that the claim is "valid" under its interpretation of ICHEIC rules, i.e. a policy was listed in the 1936 ledgers. The record shows that Generali's practice, eventually condoned by ICHEIC was *not* to approve claims based solely on anecdotal evidence.

The Notice approved was also defective because it gave the impression, with the "New Claim" forms attached to the mailed Notice, that the District Court itself was endorsing the settlement and encouraging recipients to file "New Claim" forms. Yet the filing of a new claim form is participation in the settlement, which would be prejudicial to the class members whose prior Generali or ICHEIC claims were denied.

For class members for whom the filing is a crapshoot because they had not previously been denied, the Notice is also misleading and incomplete. For example, as described by Petitioner David Grinstein, the Hebrew language notice received by class members in Israel is biased in favor joining in the settlement because it only contains only a Hebrew language *claim form* but no corresponding Hebrew language forms for opting or or lodging objections. [SJA-181-183]. According to social

worker Rizy Horwitz of NACHAS Healthnet, which serves a large segment of the Brooklyn Holocaust survivor community, survivors who received the Generali notice there were naturally inclined to file claims even though they have little or no idea about policies, because the nature of the process itself suggests that they will receive a payment, which most believe incorrectly will be $1,000. [SJA-186].

These assumptions are contrary to the reality of the situation, but the result is that many class members, like Ms. Horwitz's clients, who are overwhelmingly poor and not fluent in the English language, will lose their rights against Generali despite having no chance to benefit from the settlement. *Id.*

IV. The settling plaintiffs and Class Counsel did not adequately represent the interests of the class as a whole.

The entire settlement is inextricably tied to the representations made by the settling parties to justify the "settling plaintiffs'" surrender in the face of the pending appeals of the dismissal of the cases in *Generali II*. The Settlement Agreement maintained that ICHEIC was an appropriate settlement framework because it included organizations "representing" Holocaust victims, established "auditing standards and procedures," had "an appeal mechanism," and conducted an "extensive and world-wide publicity and notice campaign" to identify possible insurance claims related to policies issued in Europe before WWII. [A-54-55]. Most of these premises were not accurate.

ICHEIC published only a fraction of the names of Generali's corporate and branch offices, and none from its subsidiaries and affiliates. [SUP- 50-51]. Although ICHEIC conducted some independent archival research to augment the names the companies provided, it was inconsistent and incomplete.[16]

The settling parties cited ICHEIC audits as support for approval, [A- 365], yet prior to the initial Fairness Hearing, none of the ICHEIC audits were public. It was not until after the District Court initially approved the settlement that ICHEIC published its audits,[17] which revealed that the entity that handled all of the Generali claims between 2001 and 2004, had *failed.* [A-632].

Another ICHEIC safeguard was supposed to be the appeal mechanism, yet after the District Court approved the original settlement, former New York State Insurance Superintendent Albert Lewis, an ICHEIC appellate arbitrator, reported that he and other arbitrators were pressured by ICHEIC's legal office to

[16] In the Slovakian Central Property Office, for example, researchers examined a "small sample" of more than 700 boxes of records containing lists of "the assets of the firms and of their Jewish owners," yielding information on "18 policies." [A-210]. Several of the Petitioners lived in the Slovakia area of Czechoslovakia, including the Rubin, Mermelstein, Markovic, and Moskovic families, and their policies might have been found in those 700 boxes, but the effort, and others, were inexplicably limited.

[17] Class counsel conducted the "due diligence" inspection of the Generali Policy Information Center in Trieste without bringing their own translators or insurance experts. [A-191].

apply a "phantom rule" that imposed a heavier burden on claimants than ICHEIC's published rules, leading to denials of meritorious claims. SJA-147, 223.[18] Mr. Lewis also stated that ICHEIC officials were aware of the limits on total funds available from the companies, causing them to press for denials of claims. SJA-154-55, 180.[19]

ICHEIC's "relaxed standards of proof," also touted in the settlement, were commonly ignored, according to Lord Archer in a report to the ICHEIC Executive Management Committee, the Washington State Insurance Commissioner, and others. One of the most egregious tactics was the denial of claims where Generali acknowledged had a family policy, but denied payment without proving the policy was paid or lapsed. This form of rejection became known as the "negative evidence" rule and was approved by Chairman Eagleburger in June 2003. The record suggests that several thousand claims were denied on this basis.[20]

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[18] Petitioner Jack Rubin's claim was denied under this phantom rule.

[19] Mr. Lewis filed an *amicus curiae* brief in Appeal No. 07-1380.

[20] The New York Legal Assistance Group (NYLAG), which provides pro bono legal services to thousands of indigent New Yorkers also objected to the settlement on behalf of Holocaust survivors whose claims had been denied under the "negative evidence rule," and other inexplicable reasons, and submitted an *amicus curiae* brief in the Second Circuit opposing the settlement. SJA-267-72.

ICHEIC's membership did not include organizations "representing the interests" of victims of the World War II Holocaust." Though companies were present at all times, no survivors or heirs with claims, and no chosen representative of claimants participated. Moreover, the NGO leader supposedly representing victims' interests was Israel Singer, who in 2006 was barred by the New York Attorney General from participating in the management of the World Jewish Congress (one of the ICHEIC organizations) because he enriched himself with charitable dollars. SJA-67-76, 269-71, 274-78. The Claims Conference, also not a survivor organization, has been the subject of intense criticism by survivor groups for spending restitution money on board member projects while ignoring the needs of impoverished survivors. It is now under investigation by the Israseli Knessett, and was found by an Israeli court in 2008 to have defrauded Holocaust survivors. SJA-203-211, 212-13, 218-21, 238-41.

To convince the District Court to approve the settlement, Class counsel also supported Generali's untenable argument that it had no way to identify which customers were Jewish, and never provided Nazi and Axis authorities with information about Jewish customers. Despite categorical denials of both Generali and Class Counsel, Generali audit records show policies identified the "Jewish race" of the purchasers, insureds, and beneficiaries. SJA-257, A-450-52.[21]

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[21] ICHEIC never required Generali or any other company to produce their files of correspondence with Nazi and Axis authorities in which they turned over names and policy information about their Jewish customers.

There is also a substantial amount of information in the record showing Generali's fraud and deceit toward its Jewish policyholders. It has consistently misrepresented the full extent of unpaid Holocaust era policies, as well as the contents of its archives and quality of available information.[22] Generali claimed it suffered under Nazism when it actually flourished as one of the favored Axis insurers. [A-261-264]. Generali said that it could not pay survivors because its assets were "nationalized" after WWII, when in fact it had moved premium proceeds from Eastern European customers into U.S. real estate, corporate stock, and bank accounts, and entered into over 100 reinsurance agreements with U.S. reinsurers. A-261-264.[23] While Generali denied *Jewish* policyholders' claims due to supposed Soviet bloc nationalizations, it simultaneously told *non-Jewish* policyholders that expropriations in Socialist nations would "not adversely affect" their policies. [A-].

The District Court refused to consider the garish failures of ICHEIC and the misrepresentations made

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[22] Generali used IBM Hollerith cards and sorting equipment in its Trieste headquarters in the mid-1930s, is the same punch card and sorting system that Historian Edwin Black wrote in *IBM and the Holocaust* enabled the Nazis to identify, round up, and seize the assets of European Jews. *Id.*, at 34-37. *See* pages 1518-1524 of Joint Appendix in Appeal No. 05-5612.

[23] In 1946, Generali cited its reinsurance arrangements in Western markets and the risks posed to the capitalist system in its successful plea to Military authorities to be removed from the Allied Black List. Reinsurance records, which are comprehensive, were never investigated by ICHEIC. A-699-700.

by the settling parties. It approved the settlement in spite of these problems, stating that it was not his role to judge ICHEIC's performance. The Court realized that tens of thousands of claims would be lost but believed the opportunity for some "new claims" to be paid was worth it. [A-564-65]. In so doing, the District Court failed to exercise the degree of protection for absent class members required by Rule 23 and due process. *Synfuel Technologies, Inc. v. DHL Express, Inc.*, 463 F.3d 646 (7th Cir. 2006); *Reynolds v. Beneficial National Bank*, 288 F.3d 277 (7th Cir. 2002); *Figueroa v. Sharper Image Corp.*, 517 F.Supp.2d 1292 (S.D.Fla. 2007). In the settlement before this Court, the parties would sacrifice the rights of the many could be sacrificed so that a few could benefit.

CONCLUSION

For the foregoing reasons, Petitioners respectfully urge this Court to grant its writ of certiorari to the Second Circuit Court of Appeals and reverse the decision below.

Respectfully submitted,

SAMUEL J. DUBBIN, P.A.
DUBBIN & KRAVETZ, LLP
1200 Anastasia Avenue
Suite 300
Coral Gables, Florida 33134
Telephone: (305) 357-9004
Facsimile: (305) 371-4701

Attorneys for Petitioners

APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED JUNE 6, 2008

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 07-1380-CV

JACK RUBIN, ALEX MOSKOVIC, IRENE MERMELSTEIN, FRED TAUCHER, HANS LINDENBAUM, DAVID MERMELSTEIN,

Objector-Appellants,

-v.-

ASSICURAZIONI GENERALI S.P.A.,

Defendant-Appellee,

SAMUEL HERSLY, AGNES HEYMAN, PAOLA OREFFICE KULP, EUGENIA SCHENCKER,

Plaintiff-Appellees.

June 6, 2008

Present: ROGER J. MINER, JOSÉ A. CABRANES, *Circuit Judges.**

* This case was originally before a panel consisting of Judges Miner, Cabranes, and the Honorable Thomas J. Meskill. In an order issued on October 2, 2007, the panel remanded the

(Cont'd)

Appendix A

SUMMARY ORDER

AFTER ARGUMENT AND UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Plaintiffs-appellants appeal from a January 7, 2008 order of the District Court (1) approving a settlement agreement providing for the release of plaintiffs' monetary claims against defendant-appellee Assicurazioni Generali S.P.A. ("Generali") and (2) entering final judgment in Generali's favor. On October 2, 2007, we vacated a prior order of the District Court approving the settlement agreement and remanded this matter so that appropriate individual notice of the proposed settlement could be given to class members in accordance with *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620-21, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). After notice was given pursuant to our October 2, 2007 order, the District Court held a fairness hearing and issued the January 7, 208 order approving the settlement agreement. We assume the parties' familiarity with the facts, procedural history, and scope of the issues raised.

(Cont'd)

matter under the procedures set forth in *United States v. Jacobson*, 15 F.3d 19 (2d Cir.1994). Judge Meskill passed away before this matter was re-submitted. Accordingly, the appeal is being decided by the remaining two members of the panel, who are in agreement. *See* 2d Cir. Interim R. 0.14(b).

Appendix A

Plaintiffs-appellants contend that the settlement agreement "is significantly broader than the scope of the possible benefits and beneficiaries of the settlement," Supp. Br. 50, because, *inter alia*, it releases claims held by class members who will not be compensated under the settlement because they have not filed claims.[1] On this basis, they argue that "the settlement [agreement] is invalid under *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir.1981)." *Id.* at 52.

In *Super Spuds*, we invalidated a settlement on the grounds that (1) the underlying settlement agreement provided for release of two types of claim "in return for payments that were to be determined solely" based on of rights under one type of claim, 660 F.2d at 15; and (2) "the notice of settlement did not adequately apprise class members" that their second type of claim "[was] being placed on the block . . . in return [for nothing]," *id.* at 16; *see also Joel A. v. Giuliani*, 218 F.3d 132, 143 (2d Cir.2000) (noting that, in *Super Spuds*, we objected

1. Plaintiffs-appellants also contend that the settlement agreement unfairly denies recovery to individuals who previously filed unsuccessful claims with the International Commission for Holocaust Era Insurance Claims ("ICHEIC"). This concern is, however, belied by record evidence that individuals who had participated in the ICHEIC process would not be barred from submitting claims pursuant to the settlement agreement. *See, e.g.*, Supp. J.A. 22 (noting that "[a]ny Class Member may submit a Claim Form even if a prior Claim Form was denied by ICHEIC" but advising that "it is likely the claim will be denied unless the Claim Form includes new information"). Accordingly, we reject this claim as lacking in merit.

to the fact that "(1) a finite settlement fund was to be allocated among class members, and (2) claims of certain class members . . . were valued at zero in order to provide a higher payment to claims of other class members.").

The settlement agreement challenged in the instant case provides for release of all claims against Generali "resulting from or relating to any Insurance Policy," App. 65, in return for payments "based on a formula that takes into consideration amounts due on policies, currency conversion and interest. . . . ," *id.* at 119. There is no cap on the amount to be allocated among class members, and the ability to establish a valid claim constitutes the factual predicate for both the claims being released and claims being compensated. In addition, the record indicates that the notice provided to potential class members satisfied the requirements of due process, Federal Rule of Civil Procedure 23, and *Amchem Products*, 521 U.S. at 620-21. For these reasons, we conclude that it was not error for the District Court to approve the settlement. *Cf. TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (2d Cir.1982); *see also id.* at 460 ("As long as the overall settlement is found to be fair and class members were given sufficient notice and opportunity to object to the fairness of the release, we see no reason why the judgment upon settlement cannot bar a claim that would have to be based on the identical factual predicate as that underlying the claims in the settled class action." (footnote omitted)).

Appendix A

Having considered all of plaintiffs-appellants' arguments on appeal and found them to be without merit, we AFFIRM the judgment of the District Court.

FOR THE COURT,
Catherine O'Hagan Wolfe, Clerk

APPENDIX B — FINAL ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JANUARY 7, 2008

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MDL 1374
M 21-89 (GBD)

IN RE: ASSICURAZIONI GENERALI S.p.A.
HOLOCAUST INSURANCE LITIGATION

This Document Applies to:

CORNELL v. ASSICURAZIONI GENERALI S.p.A.
97 Civ. 2262 (GBD)

SCHENKER v. ASSICURAZIONI GENERALI S.p.A.
98 Civ. 9186 (GBD)

SMETANA v. ASSICURAZIONI GENERALI S.p.A.
00 Civ. 9413 (GBD)

FINAL ORDER AND JUDGMENT

This matter having come before the Court for final approval of the settlement between plaintiff class representatives Samuel Hersly, Agnes Heyman, Paola Orrefice Kulp, and Eugenia Schenker ("Plaintiffs") and Defendant Assicurazioni Generali S.p.A. ("Generale") and hearings having been held before this Court on

Appendix B

January 31, 2007, February 27, 2007 and January 7, 2008 following class notices and in accordance with a Settlement Agreement (the "Settlement Agreement") between Plaintiffs and Generali in the above-captioned actions (the "Actions"); and

Due notice of said hearings having been given in accordance with the Class Notices; the respective parties having appeared by their attorneys of record; the Court having heard and considered evidence in support of the proposed settlement of these actions (the "Settlement"); the attorneys for the parties having been heard; an opportunity to be heard having been given to all other persons requesting to be heard in accordance with the class notice; and notices to the Settlement Class certified in this action, including notice ordered by the Court of Appeals pursuant to its Summary Order of October 2, 2007, were adequate and sufficient and complied with the requirements of due process,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. "Settlement Class" and "Releasors" mean all persons worldwide, their heirs, executors, administrators, successors, beneficiaries and/or assigns, who (i) between 1920 and 1945 (the "Class Period"), purchased, or are the beneficiaries of life insurance, property insurance, and/or casualty insurance policies and/or annuities sold or issued by or through Generali (collectively "Insurance Policies"), (ii) have never been paid the proceeds of the Insurance Policies, accumulated

cash values and/or other policy benefits, including but not limited to death, disability and property benefits, (iii) are Holocaust Victims, and (iv) have not timely elected to be excluded from the Class. "Holocaust Victims" shall mean persons who were persecuted by the Nazis or their allies during the period 1933 through 1945, including Jews, Romanis, Jehovahs Witnesses, homosexuals, political dissidents and heirs of the foregoing.

2. The Class is hereby certified solely for settlement purposes, pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, the Court having determined that this action meets all the prerequisites of Rule 23(a), and (b)(3) and (c) of the Federal Rules of Civil Procedure, including numerosity, predominance of common issues, and typicality, and that Plaintiffs and their counsel are adequate representatives of the Settlement Class. The Court finds:

a. The Settlement Class easily satisfies the numerosity requirements. The responses to the class notice, the requests for claim forms, the claim forms filed, and the payouts to over 700 claimants pending final approval are indicative that the class numbers into the thousands;

b. The commonality requirement is met for the Settlement Class since the three complaints allege multiple core issues of fact and law arising out of the same set of events which each member of the class would have to prove, including

Appendix B

i. Whether Generali sold Insurance Policies, and received periodic payments toward or under said Insurance Policies from persons who were persecuted by Nazi Germany or its allies?

ii. Whether Generali refused to pay policy proceeds, accumulated cash value and/or other benefits to Class members?

iii. Whether Generali refused to divulge information about the Insurance Policies to Class members?

iv. Whether Generali breached the Insurance Policies and/or duties owed to Class members?

v. Whether Generali converted payments or benefits of the Insurance policies?

vi. Whether Generali wrongfully transferred to persons designated by local or Nazi authorities or to local governments proceeds under the Insurance Policies?

vii. Whether, as a result of the foregoing Generali has been unjustly enriched?

c. The named plaintiffs are adequate class representatives based on the allegations of the three complaints since they fall within the Settlement Class,

have interests coextensive and not antagonistic to the interests of the Settlement Class, and have represented the interests of the Settlement Class for over 10 years;

d. Plaintiffs' Counsel named in the Order of Preliminary Approval are qualified to serve as Class Counsel based upon their prosecution of the litigation for over 10 years, their conduct at hearings, their written submissions and their experience in other Holocaust Era class actions; and

e. The common questions of law and fact listed above predominate, and class treatment is far superior to individual litigation.

f. The class definition is consistent with the claims asserted in the litigation and reasonably congruent with the payment of benefits under the Settlement Agreement.

3. Certification of the Settlement Class shall be solely for settlement purposes and without prejudice to the parties in the event the settlement does not take effect.

4. The parties modified the Settlement Agreement to extend the period of time for submission of claims based on documents recovered from the Bad Arolsen World War II Archive until June 30, 2008 or six months after the opening of the Archive, whichever is shorter. It appears from the Bad Arolsen website that its Archive opened on November 28, 2007, so the deadline for

submission of claims based on documents recovered from that Archive is May 28, 2008. Both the recent class notice and the updated settlement website reference the Archive's website which contains instructions on how to request searches.

5. The Settlement between Plaintiffs and Generali, as modified, is approved as fair, reasonable and adequate within the meaning of Fed. R. Civ. P. 23 and shall be implemented in accordance with the terms and conditions of the Settlement Agreement.

6. As to the Releasees only (as that term is defined in the Settlement Agreement) the Actions are dismissed on the merits and with prejudice against Plaintiffs and all members of the Settlement Class who have not validly and timely requested exclusion from the Settlement Class and without costs. Persons who validly and timely requested exclusion from the Settlement Class, who are listed in a submission of plaintiffs' counsel and on file with the Clerk of this Court, will not be bound by this Final Order and Judgment.

7. Pursuant to the terms of the Settlement Agreement, the Court awards incentive awards to Samuel Hersly, Agnes Heyman, Paola Orrefice Kulp, Eugenia Schenker each in the amount of $5,000 to be paid by Generali.

8. Without affecting the finality of this Order and Judgment in any way, this Court hereby retains continuing jurisdiction aver the Actions, including the

administration and consummation of the Settlement and Settlement Agreement and payment of counsel fees and costs. The Court appoints Class Counsel to supervise the processing and payment of claims and report to the Court thereon.

9. The Court finds, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, that there is no just reason for delay. The Clerk of the Court is hereby directed to enter this Judgment without delay, as a final judgment of dismissal as to Generali.

Dated: New York, New York
January 7, 2003

SO ORDERED:

George B. Daniels
GEORGE B. DANIELS
United States District Judge

APPENDIX C — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED OCTOBER 2, 2007

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to summary orders filed after January 1, 2007, is permitted and is governed by this court's Local Rule 32.1 and Federal Rule of Appellate Procedure 32.1. In a brief or other paper in which a litigant cites a summary order, in each paragraph in which a citation appears, at least one citation must either be to the Federal Appendix or be accompanied by the notation: "(summary order)." A party citing a summary order must serve a copy of that summary order together with the paper in which the summary order is cited on any party not represented by counsel unless the summary order is available in an electronic database which is publicly accessible without payment of a fee (such as the database available at http://www.ca2.uscourts.gov/). If no copy is served by reason of the availability of the order an such a database, the citation must include reference to that database and the docket number of the case in which the order was entered.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 2nd day of October, Two thousand seven.

Appendix C

PRESENT:

HON. THOMAS J. MESKILL,
HON. ROGER J. MINER,
HON. JOSE A. CABRANES,
Circuit Judges.

No. 07-1380-cv

JACK RUBIN ET AL.,

Plaintiffs-Appellants,

-v.-

ASSICURAZINOI GENERALI S.P.A.,

Defendant-Appellee.

Appeal from a judgment of the United States District Court for the Southern District of New York (George B. Daniels, *Judge*).

AFTER ARGUMENT AND UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is **VACATED AND REMANDED** for further proceedings.

Plaintiffs-appellants appeal from a February 27, 2007 order of the District Court that approved a settlement agreement providing for the release of certain monetary

claims against defendant-appellee Assicurazinoi Generali S.P.A. ("Generali"). Because the notice of settlement provided to potential class members appears inadequate in light of the Supreme Court's comments in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620-21 (1997), we will remand, under the procedure set out in *United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994), so that appropriate notice may be given in an expeditious manner. Specifically, notice by first class mail should be sent to all class members whose names are known by Generali as of the date of this mandate whether or not such individuals have already filed a claim with Generali.

Accordingly, we VACATE the District Court's order of February 27, 2007, approving the settlement agreement entered into by plaintiffs-appellees and defendant-appellee, and REMAND the cause to the District Court for further proceedings consistent with this order.

We direct that the mandate be issued forthwith, providing for notice to be accomplished within sixty days of this order (November 26, 2007) and responses from interested parties to be submitted no later than thirty days thereafter (December 26, 2007). The District Court shall conduct a fairness hearing by no later than January 7, 2008. At that point, plaintiffs-appellants' appeal will be renewed in this Court. Plaintiffs-appellants will then have three weeks, that is, until January 29, 2008, to submit ally briefs to this Court. Appellees will have three weeks, that is, until February 19, 2008, to submit any response. Plaintiffs-appellants may submit a reply

thereto within no later than ten days, that is, on or before February 29, 2008. The matter will then be deemed resubmitted to this panel, which will resolve such further proceeding without oral argument unless otherwise ordered.

FOR THE COURT,
Catherine O'Hagan Wolfe, Clerk

By: s/ Oliva M. George
Oliva M. George, Deputy Clerk

APPENDIX D — FINAL ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED FEBRUARY 27, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MDL 1374
M 21-89 (GBD)

IN RE: ASSICURAZIONI GENERALI S.p.A.
HOLOCAUST INSURANCE LITIGATION

This Document Applies to:

97 CV 2262 (GBD)
CORNELL v. ASSICURAZIONI GENERALI S.p.A.

98 CV 9186 (GBD)
SCHENKER v. ASSICURAZIONI GENERALI S.p.A.

00 CV 9413 (GBD)
SMETANA v. ASSICURAZIONI GENERALI S.p.A.

FINAL ORDER AND JUDGMENT

This matter having come before the Court for final approval of the settlement between plaintiff class representatives Samuel Hersly, Agnes Heyman, Paola Orrefice Kulp, and Eugenia Schenker ("Plaintiffs") and Defendant Assicurazioni Generali S.p.A. ("Generali")

and a hearing, pursuant to this Court's Order of October 31, 2006 (the "Notice and Hearing Order"), having been held before this Court on January 31, 2007 and continued on February 27, 2007, in accordance with a Settlement Agreement (the "Settlement Agreement") between Plaintiffs and Generali in the above-captioned actions (the "Actions); and

Due notice of said hearing having been given in accordance with the Notice and Hearing Order; the respective parties having appeared by their attorneys of record; the Court having heard and considered evidence in support of the proposed settlement of these actions (the "Settlement"); the attorneys for the parties having been heard; an opportunity to be heard having been given to all other persons requesting to be heard in accordance with the Court's Notice and Hearing Order; and notice to the Settlement Class certified in this action pursuant to the Notice and Hearing Order was adequate and sufficient and complied with the requirements of due process,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. "Settlement Class" and "Releasors" mean all persons worldwide, their heirs, executors, administrators, successors, beneficiaries and/or assigns, who (I) between 1920 and 1945 (the "Class Period), purchased, or are the beneficiaries of life insurance, property insurance, and/or casualty insurance policies and/or annuities sold or issued by or through Generali

(collectively "Insurance Policies"), (ii) have never been paid the proceeds of the Insurance Policies, accumulated cash values and/or other policy benefits, including but not limited to death, disability and property benefits, (iii) are Holocaust Victims, and (iv) have not timely elected to be excluded from the Class. "Holocaust Victims" shall mean persons who were persecuted by the Nazis or their allies during the period 1933 through 1945, including Jews, Romanis, Jehovahs Witnesses, homosexuals, political dissidents and heirs of the foregoing.

2. The Class is hereby certified solely for settlement purposes, pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, the Court having determined that this action meets all the prerequisites of Rule 23(a), and (b)(3) and (c) of the Federal Rules of Civil Procedure, including numerosity, predominance of common issues, and typicality, and that Plaintiffs and their counsel are adequate representatives of the Settlement Class. The Court finds:

a. The Settlement Class easily satisfies the numerosity requirements. The responses to the class notice, the requests for claim forms, the claim forms filed, and the payouts to over 700 claimants pending final approval are indicative that the class numbers into the thousands;

b. The commonality requirement is met for the Settlement Class since the three complaints allege multiple core issues of fact and law arising out of the

same set of events which each member of the class would have to prove, including:

i. Whether Generali sold Insurance Policies, and received periodic payments toward or under said Insurance Policies from persons who were persecuted by Nazi Germany or its allies?

ii. Whether Generali refused to pay policy proceeds, accumulated cash value and/or other benefits to Class members?

iii. Whether Generali refused to divulge information about the Insurance Policies to Class members?

iv. Whether Generali breached the Insurance Policies and/or duties owed to Class members?

v. Whether Generali converted payments or benefits of the Insurance Policies?

vi. Whether Generali wrongfully transferred to persons designated by local or Nazi authorities or to local governments proceeds under the Insurance Policies?

vii. Whether, as a result of the foregoing, Generali has been unjustly enriched?

c. The named plaintiffs are adequate class representatives, based on the allegations of the three complaints, since they fall within the Settlement Class, have interests coextensive and not antagonistic to the interests of the Settlement Class, and have represented the interests of the Settlement Class for almost ten (10) years;

d. Plaintiffs' Counsel, named in the Order of Preliminary Approval, are qualified to serve as Class Counsel based upon their prosecution of the litigation for almost ten (10) years, their conduct at hearings, their written submissions and their experience in other Holocaust Era class actions; and

e. The common questions of law and fact listed above predominate, and class treatment is far superior to individual litigation.

f. The class definition is consistent with the claims asserted in the litigation and reasonably congruent with the payment of benefits under the Settlement Agreement.

3. Certification of the Settlement Class shall be solely for settlement purposes and without prejudice to the parties in the event the settlement does not take effect.

4. The parties have twice modified the Settlement Agreement (a) to extend the deadline for submission of New Claims until March 31, 2007 and (b) to extend the

period of time for submission of claims based on documents recovered from the Bad Arolsen World War II Archive until June 30, 2008 or six months after the opening of the Archive, whichever is shorter. If the Archive is not opened by May 1, 2008, claims based on documents obtained from the Archive may still be made if received by Generali within sixty (60) days of such opening, but no later than August 31, 2008.

5. The Settlement between Plaintiffs and Generali, as modified, is approved as fair, reasonable and adequate within the meaning of Fed.R.Civ.P. 23, and shall be implemented in accordance with the terms and conditions of the Settlement Agreement.

6. As to the Releasees only (as that term is defined in the Settlement Agreement) the Actions are dismissed on the merits and with prejudice against Plaintiffs and all members of the Settlement Class, who have not validly and timely requested exclusion from the Settlement Class, and without costs. Persons who validly and timely requested exclusion from the Settlement Class, who shall be listed in a submission by Plaintiffs' Counsel filed with the Clerk of this Court, will not be bound by this Final Order and Judgment.

7. Pursuant to the terms of the Settlement Agreement, the Court awards incentive awards to Samuel Hersly, Agnes Heyman, Paola Orrefice Kulp, Eugenia Schenker each in the amount of $5,000 to be paid by Generali.

8. Without affecting the finality of this Order and Judgment in any way, this Court hereby retains continuing jurisdiction over the Actions, including the administration and consummation of the Settlement and Settlement Agreement and payment of counsel fees and costs. Plaintiffs' Counsel shall supervise the processing and payment of claims and report to the Court thereon.

9. The Court finds, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, that there is no just reason for delay. The Clerk of the Court is hereby directed to enter this Order and Judgment without delay as a final judgment of dismissal as to Generali.

Dated: New York, New York
February 27, 2007

SO ORDERED:

s/ George B. Daniels
GEORGE B. DANIELS
United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING FILED SEPTEMBER 15, 2008

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE, NEW YORK, N.Y. 10007

Catherine O'Hagan Wolfe
CLERK OF COURT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 15th day of September two thousand and eight,

ORDER

No. 07-1380-cv

Jack Rubin, Alex Moskovic, Irene Mermelstein, Fred Taucher, Hans Lindenbaum, David Mermelstein

Objector-Appellants,

v.

Assicurazioni Generali S.P.A.,

Defendant-Appellee,

Appendix E

Samuel Hersly, Agnes Heyman, Paola Oreffice Kulp, Eugenia Schencker,

Plaintiff-Appellees.

Appellants Jack Rubin, Alex Moskovic, Irene Mermelstein, David Mermelstein, Fred Taucher, Hans Lindenbaum, Hanna Hareli and David Frinstein having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: s/ Frank Perez
Frank Perez, Deputy Clerk

117 (3) No. 08-780

Supreme Court, U.S.
FILED
JAN 16 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JACK RUBIN, ALEX MOSKOVIC, DAVID MERMELSTEIN, IRENE MERMELSTEIN, FRED TAUCHER, HANS LINDENBAUM, HANNA HARELI, and DAVID GRINSTEIN,

Petitioners,

v.

ASSICURAZIONI GENERALI S.p.A, SAMUEL HERSLY, AGNES HEYMAN, PAOLA OREFFICE KULP, and EUGENIA SCHENCKER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ASSICURAZIONI GENERALI S.p.A

PETER SIMSHAUSER
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
One Beacon Street
Boston, MA 02108
(617) 573-4800

MARCO E. SCHNABL
Counsel of Record
SHVETA KAKAR
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036
(212) 735-3000

Counsel for Respondent Assicurazioni Generali S.p.A

220507

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the caption.[1]

Respondent Assicurazioni Generali S.p.A. ("Generali") is an Italian corporation. It has no parent corporation and the only publicly held corporation that owns 10% or more of its stock is Mediobanca, S.p.A., another Italian corporation.

[1] Petitioners Hanna Hareli and David Grinstein were not original parties to the appeal before the Second Circuit. *See* Petition for Certiorari, Appendix A (caption).

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U.S. Sup. Ct. R. 10 1

INTRODUCTION

Petitioners are objectors intent on scuttling a class action settlement of claims brought by Holocaust victims and their heirs concerning insurance policies issued by Generali and certain of its affiliates or subsidiaries in Europe before World War II. That settlement was carefully and repeatedly scrutinized by the courts below, and found to be fair, adequate, and reasonable, and in the best interests of the class. The petition for a writ of certiorari (the "Petition") raises no split between Circuit Courts, no conflict with any decision of this Court, and no important federal question; and no departure from the accepted and usual course of judicial proceedings has occurred. *See* Sup. Ct. R. 10. Rather, this case is a routine application of Rule 23 of the Federal Rules of Civil Procedure ("Rule 23") that was fully and fairly addressed by the courts below. The Petition should be denied.[2]

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[2] Petitioners' citation conventions are adopted herein. Therefore, the opinions below are cited to by referring to the Appendix to Petitioners' petition for certiorari ("Petition, Appendix __"). In addition, references to the circuit court record are based on the appendices filed in the Second Circuit, Appeal No. 07-1380-cv (the "Second Circuit Action"), as follows: A-# refers to the Joint Appendix, SUP-# refers to the Supplemental Appendix of Plaintiffs-Appellants, SPA-# refers to the Special Appendix, SJA-# refers to the Supplemental Joint Appendix, ASA-# refers to Appellees' Supplemental Index, and ASSA-# refers to Appellee's Second Supplemental Index.

COUNTERSTATEMENT OF CASE

Petitioners challenge a settlement that comes after a decade of litigation over policies sold by Generali before World War II in Europe to persons who later became victims of the Holocaust.[3] It was negotiated on behalf of the settlement class by experienced and reputable Class Counsel *after* the District Court (Mukasey, J.) dismissed the litigation as preempted on the same grounds that led this Court, in *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003), to strike state legislation specifically designed to promote such litigation. *See In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 340 F. Supp. 2d 494, 497-508 (S.D.N.Y. 2004).[4]

---

[3] The settlement comes also after the close of the monumental effort, lasting the better part of a decade, by the International Commission on Holocaust Era Insurance Claims ("ICHEIC"), presided by former Secretary of State Lawrence Eagleburger, to identify and pay pre-war policies issued to Holocaust victims. Generali and other major European insurers voluntarily participated in ICHEIC, and thousands of Generali policies were paid in that process under generous valuation, eligibility, and evidentiary standards. The enormous scope of the task, its technical complexity, and the vast archival, economic, and historical research involved, is summarized and available on ICHEIC's website, http://www.icheic.org/pdf/ICHEIC%20Legacy%20Document.pdf (last visited January 15, 2009).

[4] An appeal of Judge Mukasey's ruling was pending in the Second Circuit at the time of the settlement and is still being pursued by certain individuals who opted out of the settlement, one of whom is represented by counsel for

(Cont'd)

The settlement provided an opportunity to receive payment in respect of long-lapsed European insurance policies to a worldwide class of Holocaust victims and their heirs who may have been former insureds of Generali or of certain of its pre-war affiliates or subsidiaries. In addition, the settlement provided that Generali would pay all claims in respect of Generali policies that remained pending and unpaid at the conclusion of the ICHEIC process, after the exhaustion of $100 million that Generali had made available to ICHEIC in 2001 for the payment of claims. (A-67.) Some 50,000 applications under the settlement were received from all over the world before the filing deadline. In deference to the age of many applicants, Generali has already processed some 14,000 applications and paid more than $36 million despite the lack of appellate finality. (SJA-38 at 7.)

Each Petitioner could easily have opted out of the settlement, as other opt-outs have done, thus

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(Cont'd)

Petitioners. In response to the Court of Appeals' recent inquiry, the United States Government has *confirmed* that litigation of Plaintiffs' claims is inconsistent with the Government's policy to resolve Holocaust-related disputes through negotiation. That policy was given effect in *Garamendi*, 539 U.S. at 421 ("the consistent Presidential foreign policy has been to encourage European governments and companies to volunteer settlement funds [for Holocaust-era related claims] in preference to litigation"), and relied upon by Judge Mukasey in dismissing the claims encompassed by the settlement. Petitioners mischaracterize the Government's straightforward response as "ambiguous" (Petition at 8-9 n.7), but avoid even a summary reference to its contents, much less any quotation from it.

preserving their right to litigate, and their potential ability to "discover records", "put Generali under oath", or engage in "cross examination" in litigation. (Petition at 15.) Instead, no Petitioner opted out, no doubt to be able to voice their persistent opposition to any negotiated resolution of Holocaust-related matters.[5]

The District Court carefully considered Petitioners' objections at three fairness hearings.[6] And the Second Circuit considered these objections on at least three different occasions – on a first round of briefing and argument, on a second round of briefing after a

---

[5] At least two of the Petitioners (Alex Moskowitz and Fred Taucher), represented by the same counsel here, unsuccessfully opposed another Holocaust-era settlement of claims against Swiss banks. *See In re Holocaust Victim Assets Litig.*, 424 F.3d 132 (2d Cir. 2005), *cert. denied*, 547 U.S. 1206 (2006). In the same matter, Petitioner's counsel was criticized by the District Court for standing by while one of his clients sought to "extort" funds from the settlement. *In re Holocaust Victim Assets Litig.*, 311 F. Supp. 2d 363, 375 (E.D.N.Y. 2004), *aff'd*, 424 F.3d 150 (2d Cir. 2005), *cert. denied*, 547 U.S. 1206 (2006). As far back as 2000, counsel for Petitioners wrote to Attorney General Janet Reno excoriating ICHEIC and urging no support for the (eventually concluded) agreement between the United States and Germany that secured billions of dollars in additional reparations payments for World War II claims, including insurance. (A-247-66.) Likewise, Petitioner David Mermelstein and others wrote in 2000 to Deputy Secretary Stuart Eizenstat, then the Clinton Administration special envoy for Holocaust matters, objecting to any negotiated resolution of insurance claims against German companies. (A-267-71.)

[6] *See generally* January 31, 2007, February 27, 2007 and January 7, 2008 Fairness Hearing transcripts (A-353-433, A-507-70 and SJA-35-66, respectively).

supplemental worldwide mail notice was completed, and on Petitioners' motion for reconsideration.

When the settlement was first presented for approval before the District Court on January 31, 2007, Petitioners' "primary objection" (A-561) was that its original filing deadline would not accommodate a possible search for archival information that Petitioners' counsel speculated might be found in certain World War II archives located in the German city of Bad Arolsen. At the District Court's invitation, Generali and Class Counsel then amended the Settlement Agreement (A-442-47) to extend the filing deadline for claims supported by materials from those archives until well past the time that Petitioners' counsel stated was needed for this purpose. (A-444.) When the amended settlement was presented for approval, the District Court thus noted that the amendment yielded "even greater [results] than what was argued . . . by objectors as to what would be reasonable on [that] particular issue." (SPA-3.)

The District Court approved the settlement on February 27, 2007. (Petition, Appendix D; SPA-11-15.) Petitioners appealed. On October 2, 2007, the Second Circuit, raising no concerns with any other of Petitioners' arguments, remanded to the District Court for the limited purpose of effecting notice by mail to possible class members whose names were known by Generali. (Petition Appendix C; SJA-6-7.) As a result, a further notice, approved by the District Court (SJA-8-9), was thereafter mailed to 49,326 individuals, and to 97 legal and institutional representatives worldwide representing 3,155 additional possible class members.

(SJA-18.) This mail notice ordered by the Court of Appeals was *in addition to* the comprehensive program of worldwide notice in 16 languages carried out pursuant to the notice plan approved earlier by the District Court. (A-85; A-87-100 (details of the worldwide notice program).)

On January 7, 2008, after the supplemental mail notice ordered by the Court of Appeals had been completed, the District Court held another fairness hearing, preceded by another opportunity for Petitioners to brief and argue any objections they chose to make. The District Court approved the settlement again, finding that the mail notice sent out was "consistent with the Second Circuit's remand and mandate" (SJA-63 at 62) and "adequate and sufficient and complied with the requirements of due process." (SJA-2; Petition, Appendix B at 7a.) After entertaining yet another round of briefing (in which Petitioners again raised many of their arguments here), the Second Circuit affirmed the judgment of the District Court on June 6, 2008. *See* Petition, Appendix A. On September 15, 2008, the Second Circuit, having considered a *third* set of Petitioners' briefs on these matters, denied Petitioners' Petition for Panel Rehearing or Rehearing En Banc. *See* Petition, Appendix E. This Petition followed.

REASONS FOR DENYING THE PETITION

None of Petitioners' arguments merits review. Petitioners challenge the settlement under *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). (Petition at 14-25.) The simple misapplication of properly stated rules of law, which is all Petitioners assert, does not warrant review. Further, Petitioners contend that the Second Circuit misapplied its own precedent in *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir. 1981) (Petition at 18-19), a contention that does not merit review either. Petitioners' remaining ancillary arguments object to the wording of the class notice, and allude to ICHEIC's alleged failings and Class Counsel's adequacy. (Petition at 25-33.) These objections, which challenge fact-intensive matters reserved to the lower court's discretion, were all considered and rejected by the courts below, and provide no basis for review.[7]

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[7] Some eighteen months after entering into the settlement, ICHEIC participants, including Generali, volunteered to Congress their intention to continue entertaining Holocaust-related claims that might be made in years to come, despite the conclusion of the ICHEIC process – assurances that Generali intends to honor but which are not legally binding. *E.g.*, *Frazier v. American Airlines, Inc.*, 434 F. Supp. 2d 279, 287 (D. Del. 2006) ("statements made by . . . executives during the Senate Subcommittee hearing" that "[American Airlines] 'intend[s] to offer retirees pass privileges' . . . is, at most, a statement of future intent, and therefore, it is insufficient to constitute a binding contractual offer"), *aff'd*, 229 Fed. Appx. 171 (3d Cir. 2007). Yet Petitioners claim that this

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I. THERE IS HERE NO RULE 23 OR DUE PROCESS VIOLATION UNDER *AMCHEM* OR *ORTIZ*, AND NO *NATIONAL SUPER SPUDS* ISSUE TO MERIT GRANT OF CERTIORARI

Petitioners attempt to analogize this settlement to those rejected in *Amchem* and *Ortiz*. Both are cases with "serious intra-class conflicts" between those class members who, at the time of the settlement, were already afflicted with an asbestos-related disease, and those who had been exposed to asbestos but did not have a manifest injury (exposure-only class members). *Amchem*, 521 U.S. at 610; *see also Ortiz*, 527 U.S. at 856-57. This issue, although central to the singular instance of widespread asbestos settlements, is of no relevance to this case. Petitioners struggle to fit this case into the *Amchem/Ortiz* template by creating artificial sub-classes in what is a uniform settlement class, and likewise manufacture sub-classes that, in their view, are releasing claims without compensation, in violation of *Super Spuds*.

(Cont'd)

statement renders the settlement unfair or illusory. (Petition at 12-13.) They are wrong. An unenforceable statement of voluntary intention (*see id.* at n.12 (speaking of "intentions regarding future claims which may be submitted on Holocaust era insurance policies")) is not a substitute for an enforceable settlement under court supervision, nor does it render such a settlement illusory. *E.g.*, *Vitkus v. Beatrice Co.*, 11 F.3d 1535, 1539 (10th Cir. 1993) (release supported by consideration because no pre-existing duty to pay).

In the end, Petitioners' objection is that *they* (and perhaps others whose applications under the settlement may not lead to compensable policies) will be treated "inequitably" because their experiences in the ICHEIC process suggest that they would not receive offers of compensation in the settlement. (Petition at 24-25.) That, however, is a simple eligibility issue and betrays no inequity or structural flaw in the settlement that would place it at odds with *Amchem*, *Ortiz*, or *Super Spuds*. Reasonable criteria for eligibility and compensation are routine in Rule 23(b)(3) settlements to distinguish between compensable and non-compensable claims and to determine the amount of compensation due. Unlike the thousands who received compensation under ICHEIC, no compensable policy could be found to exist for *these* individual Petitioners. But this is not surprising, as most of these Petitioners never even claimed to have had a Generali policy in their families. For example, Petitioner Alex Moskowitz' application to ICHEIC contained no indication he believed *Generali* had issued a policy to his family – he simply asked ICHEIC to investigate if any ICHEIC member company had issued such a policy. Likewise for Petitioners Irene and David Mermelstein. So too, Petitioners Taucher and Lindenbaum never made *any* application to ICHEIC asserting even a belief that Generali had issued a policy to someone in families. (A-234-42.) The record of how Petitioners' applications to ICHEIC were addressed, to the extent known to Generali, was laid out in full before the courts below and was unchallenged. Contrary to the impression they seek to give here, that record confirms that Petitioners' claims were fairly addressed and, in those cases where the claimants elected to follow with binding appeal, the

results were affirmed before impartial and distinguished appellate arbitrators. (*Id.*)

A. The Settlement Raises No *Amchem* Issue

In *Amchem*, this Court rejected the settlement because the tension between already-afflicted and exposure-only class members, as well as differences in applicable law, barred a finding of "predominance" under Rule 23(b)(3). *Amchem*, 521 U.S. at 623-24. Also, the difference in the medical conditions and financial incentives of these subclasses did not permit an adequacy-of-representation finding under Rule 23(a)(4) where no "structural assurances" had been put in place separately to protect these disparate interests. *Amchem*, 521 U.S. at 625-27.

By contrast, every class member can submit an application in the settlement that will be addressed under the same eligibility and valuation criteria, a point Petitioners accept. (Petition at 19.) Unlike *Amchem*, where "[c]lass members . . . receive[d] no compensation for certain kinds of claims", like consortium claims, claims by exposure-only plaintiffs, and pleural claims, 521 U.S. at 604, no class member with a valid policy is excluded from compensation under this settlement. There exists no "category" of class members that are subject to a different treatment under the settlement – *all* class members, victims of the Holocaust with a compensable Generali policy during the Class Period (or their heirs), will have their claims paid under the *same* eligibility and valuation criteria. Class members can recover, as most applicants did in ICHEIC, even if they lack any information about a Generali policy in their

families, solely on the basis of a request that Generali search its own records for such a policy based on family information provided by applicants. Similar criteria produced recoveries for thousands in the ICHEIC process, and the Court of Appeals found no abuse of discretion in the District Court's conclusion that the settlement adopting such criteria was fair, reasonable, and adequate. Nothing in *Amchem* offers a basis to grant certiorari here.

B. The Settlement Raises No Issue Under *Ortiz*

Ortiz involved a "mandatory" Rule 23(b)(1)(B) class on a "limited fund" theory with no opt out rights. *Ortiz*, 527 U.S. at 845-47. In rejecting the settlement, this Court principally objected to the absence of support for the finding of a "limited fund", *id.* at 848-54, and to the inequitable treatment within the class, *id.* at 855-60, shortcomings rendered all the worse by the no-opt-out feature of the settlement. As in *Amchem* two years earlier, it criticized the conflict in treating present and future claimants similarly despite the difference in their circumstances. *Id.* And as was the case in *Amchem*, the settlement in *Ortiz* did not "provid[e] for procedures to resolve the difficult issues of treating such differently situated claimants with fairness as among themselves." *Ortiz*, 527 U.S. at 856; *see also id.* ("[A] class divided between holders of present and future claims . . . requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel.").

None of the foregoing applies here. This settlement, as noted, is *not* of the limited fund type, but a "claims

made" settlement under Rule 23(b)(3). (Petition, Appendix A at 4a ("There is no cap on the amount to be allocated among class members").) This is a *open-ended* settlement, in which *all* validated claims will be paid (A-566, SJA-38 at 7-8), and where all class members had a right to opt out. On that basis alone, *Ortiz* offers Petitioners no basis to seek review.[8] Moreover, any reference to ICHEIC as a $100 million "limited fund" is wholly irrelevant and misleading.[9] This settlement gives rise to none of the tensions stemming from the competition over a limited fund or from the disparate treatment of certain class members that troubled this Court in *Ortiz*. That the settlement contains valuation and eligibility standards (Petition at 23-25) leading to individualized payments based on the currency in which a compensable policy was written, its amount, the

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[8] For that reason too, and contrary to Petitioners' claim (Petition at 25), there are no Seventh Amendment jury trial rights at issue here. Petitioners were all free to opt-out and pursue their claims in court but deliberately eschewed that course. *See Ortiz*, 527 U.S. at 846-47 ("Unlike Rule 23(b)(3) [at issue here], objectors to the collectivism of a *mandatory* subdivision (b)(1)(B) action have no inherent right to abstain.") (emphasis added).

[9] To be sure, Generali's exposure to ICHEIC was originally capped at $100 million (A-67), believed to be more than sufficient to pay all Generali-related ICHEIC claims. Thus, ICHEIC never allocated compensation to claimants as if from a "limited fund" to guarantee no eventual shortfall in payments – all compensable claims were paid in full on an ongoing basis under ICHEIC criteria, and therefore there remained certain unpaid claims at the conclusion of the ICHEIC process after the exhaustion of the $100 million. This settlement funded the payment of those claims for which $36 million has already been expended. There remain no unpaid Generali-related ICHEIC claims outstanding.

country in which it was issued, and other factors offers no basis to mount a challenge under *Ortiz*. Quite the contrary, as these criteria ensure the treatment of claimants tailored to individual circumstances, a feature absent in *Ortiz*. In any event, these standards were carefully considered by the courts below in determining that this settlement was fair.[10]

Petitioners postulate artificial categories of claimants – those who had submitted ICHEIC claims, those who may be "unaware" that they may be class members, and those who purchased policies from Generali subsidiaries – to bring this settlement under *Ortiz*. But there is no genuine inter-class conflict: all class members are Holocaust victims (or their heirs/

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[10] Petitioners assert, *ipse dixit*, that the values offered in ICHEIC were "below their true values" (Petition at 24), relying entirely on the discreditable speculations of Mr. Sidney Zabludoff, and that therefore the class as a whole did not "get the best possible recovery from the available funds" under this settlement as required under *Ortiz*. In fact, the amounts offered were extremely generous for policies written typically in local currencies that lost most of their value during and following World War II. The valuation guidelines developed in ICHEIC and incorporated into this settlement provide for the conversion of these currencies to U.S. dollars using 1938 exchange rates, a generous presumption which insulated claimants from the collapse these currencies suffered thereafter. These base dollar values are then multiplied by 10 to establish the dollar values as of December 31, 1998 and updated by applying to them the consumer price index in the United States for each year after 1998. (ASA 38.) Recoveries in the ICHEIC process averaged almost $ 25,000 for compensable Generali claims, with some recoveries in the hundreds of thousands of dollars or more, depending on the particulars of the policy involved. (ASA-54.)

successors) who were insureds or beneficiaries of policies issued by Generali or certain of its affiliates before the end of World War II in Europe (A-58), and there is no characteristic or condition that meaningfully distinguishes members of these spurious categories from other class members. All class members are subject to the *same* eligibility and valuation criteria, which are applied *uniformly* to their situation based on the particulars of the specific policy that was issued to them or to a member of their family. There is no room here for any claim of inter-class conflict or of inequity as in *Ortiz*.[11]

C. *Super Spuds* Offers No Basis To Grant Certiorari

Petitioners also argue that certain claimants are being asked to release their claims under the settlement without compensation, in violation of *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir. 1981). The alleged misapplication by the Second Circuit of its own precedent offers no basis for review. In any event, Petitioners' argument has no merit.

Super Spuds invalidated a settlement that released claims not asserted in the complaint for no consideration. In *Super Spuds*, the complaint sought to recover on behalf of a class of purchasers of certain liquidated futures contracts. *Id.* at 11. However, the settlement also

[11] Petitioners claim that the District Court did not examine this settlement from a certification standpoint (Petition at 22), a contention squarely contradicted by the District Court's careful examination of this settlement pursuant to Fed. R. Civ. P. 23(b)(3). (Petition, Appendix B at 8a-10a; SJA-2-4.)

precluded (but did not offer compensation for) claims based on *un*liquidated contracts, a feature the settlement notice omitted. *See id.* at 13-14. The releases were thus broader than the claims asserted and the settlement would have inappropriately extinguished the objectors' claims on *un*liquidated contracts without compensation. The Second Circuit observed that "the underlying settlement agreement [in *Super Spuds*] provided for release of two types of claim 'in return for payments that were to be determined solely' based on the rights under one type of claim." (Petition, Appendix A, at 3a (quoting *Nat'l Super Spuds*, 660 F. 2d at 14).) In other words, payments to holders of liquidated futures could not be secured by sacrificing the claims of holders of *un*liquidated contracts whose claims were also extinguished in the settlement.

To shape this settlement into the *Super Spuds* mold, Petitioners rely on the artificial "categories" of claimants they say are being asked under the settlement to release claims without compensation – those who had their claims previously denied under ICHEIC[12], those who

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[12] Petitioners' claim that the settlement offers no compensation to those previously denied under ICHEIC by making ICHEIC denials "legally binding". (Petition at 15.) But as the Second Circuit confirmed (Petition, Appendix A at n.1) and as Petitioners acknowledge (Petition at 19), the settlement does not bar persons whose claims were previously denied in the ICHEIC process from submitting new applications for compensation. However, Petitioners contend that the courts below misapprehended their argument, which is that it would be *futile* for ICHEIC applicants to try and submit an application, and, therefore, those previously denied in the

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never filed a claim[13], and those who purchased a policy from a Generali subsidiary.[14] This is simply not so. In this settlement there is complete congruity between the

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ICHEIC process would be releasing Generali for no consideration. (*Id.*) Although the notice approved by the courts expressly observed that absent additional or new information about a prior claim, or claims made in the name of a previously unmentioned relative, the results of a search for a compensable policy in Generali's archives under the settlement would likely be similar to the results under the ICHEIC process, this merely confirms the integrity and consistency of the search methodology applied. There is nothing "futile" in a settlement that allowed applicants who had already availed themselves of the ICHEIC process to submit new or different information in an effort to locate a compensable policy. In fact, as the District Court noted, these individuals would get "two bites at the apple" — first under ICHEIC and then under the settlement. (A-391.)

[13] This "category" of persons who have not filed a claim because they are not aware of their class membership hardly raises a *Super Spuds* issue; that is so in *every* class action settlement, and implicates only an issue about the adequacy of notice, entirely absent here where some 50,000 persons the world over have made applications in the settlement. *See* Point II, *infra*.

[14] Documented claims against often long defunct pre-war local Generali subsidiaries or affiliates (for whom Generali would ordinarily not be liable) are encompassed by the Settlement and raise no *Super Spuds* issue. Generali's agreement to pay for validated policies issued by subsidiaries or affiliates continues to be beneficial to claimants, no matter how often Petitioners decry the absence of subsidiary or affiliate records (Petition at 20-21) – a perfectly understandable situation after many decades, wars, and Nazi and Communist revolutions. (A-472-76.)

claims asserted and compensated, and the releases given. The settled class complaints sought relief on behalf of Holocaust victims who claim that they were insureds or beneficiaries (and/or their heirs/successors) on Generali policies, and assert claims related to insurance policies issued by Generali before the end of World War II throughout Europe. (ASA-12; ASA-15.) And correspondingly, "the settlement agreement challenged in the instant case provides for release of all claims against Generali 'resulting from or relating to any Insurance Policy,'" during that period. (Petition, Appendix A, at 4a (citing to A-65).) Thus, no group here, let alone the "tens of thousands" of people hypothesized by Petitioners, was asked to surrender uncompensated claims or claims not made in the settled complaints for the benefit of the compensated class, as was the case in *Super Spuds.*[15]

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[15] That "tens of thousands" of potential claimants still exist is an extravagant notion of Mr. Zabludoff (whose declarations were repeatedly submitted by Petitioners to the courts below) that there were 110,000-150,000 "Jewish" Generali policies, of which he surmises, $2 billion in value remain unpaid. (Petition at i & n.1.) This is erroneous speculation. For example, the bedrock of Zabludoff's hypothesis is that there were 56.1 million policies in force in all Europe before the war, from which he assigned a share to Generali. But the 56.1 million total included some 45 million policies (more than 80% of the total) in the German, Dutch and Belgian markets. (A-230-31). These countries have their own domestic arrangements for the repayment of Holocaust-era claims and Generali was *never responsible* for German, Dutch or Belgian claims either in ICHEIC *or in this settlement* – this alone overstates Zabludoff's estimate by more than 5 fold. In fact, total Generali policies (Jewish *and* non-Jewish) in force at the end of 1936 numbered

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As noted, the Petitioners' singular underlying objection is to the reasonable requirement that the existence of a compensable claim be shown as a threshold to recovery. (Petition at 19-20.) However, that objection has nothing to do with the scope of the releases under *Super Spuds*. As the Second Circuit properly stated in rejecting this argument, "the ability to establish a valid claim constitutes the factual predicate for both the claims being released and claims being compensated." (Petition, Appendix A, at 4a.) [16]

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about 89,000, as verified by independent auditors (A-244-45), of which only a small percentage could have been held by customers who were Jewish or other targeted Holocaust victims (and thus covered by ICHEIC or this settlement), given the known European population makeup at the time. *See* Int'l Comm'n on Holocaust Era Ins. Claims, *Task Force Report on The Estimation of Unpaid Holocaust Era Insurance Claims in Germany, Western and Eastern Europe, available at* http://www.icheic.org/pdf/Pomeroy-Ferras%20Report.pdf (last visited Jan. 15, 2009).

[16] None of the authorities that confirms the teaching of *Super Spuds* and on which Petitioners rely (Petition at 17-18) is applicable, because there is just no *Super Spuds* issue here, as the Second Circuit's decision confirmed. *See Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 782-83 (7th Cir. 2004) (settlement reallocated recovery from one class to another); *Piambino v. Bailey*, 610 F.2d 1306, 1329 (5th Cir. 1980) (settlement unfair to class members who, unlike any here, had already obtained valuable judgments against the defendant in other forums entitled to full faith and credit), *cert. denied*, 449 U.S. 1011 (1980); *Petruzzi's, Inc. v. Darling-Delaware Co.*, 880 F. Supp. 2d 292, 301-02 (M.D. Pa. 1995) (antitrust settlement rejected because only the settling defendant's customers would be

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II. PETITIONERS' OBJECTIONS TO THE FORM OF CLASS NOTICE DO NOT MERIT REVIEW

Notice need only be "'reasonably calculated under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). The adequacy of notice is within the sound and broad discretion of the district court. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 113-16 (2d Cir. 2005), *cert. denied*, 544 U.S. 1044 (2005). The particulars about notice to which Petitioners object were all addressed fully by the courts below – indeed, the Second Circuit ordered worldwide mail notice in response to one of the Petitioners' objections. And none offers any basis for review.

The class notice provided, in terms the courts below repeatedly reviewed, all the information required by

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compensated, although customers of the other defendant had the same conspiracy claim against the settling defendant); *Molski v. Gleich*, 318 F.3d 937, 953-54 (9th Cir. 2003) (only lead plaintiff and his attorney were entitled to recover damages). *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 808-09 (3d Cir.1995), *cert. denied*, 516 U.S. 824 (1995), and *In re Ford Motor Co. Bronco II Products Liability Litigation*, Civ. A. MDL-991, 1995 WL 222177, at *4-5 (E.D. La. Mar. 15, 1995), involved non-cash settlements awarding class members unusable coupons and safety information already mandated by federal law, and are similarly inapplicable and involve distinguishable facts.

Rule 23, including the right to opt out, to object, and the particulars of the settlement. (SJA-23-26.) The notice advised that class members would be bound unless they took steps to exclude themselves. (SJA-24.)

However, Petitioners continue to object to notice because it did not (falsely) say, as Petitioners wished, that the results of previous ICHEIC applications would be "legally binding" (Petition at 26), because it gave the "impression" that the court endorsed the settlement, because it "wrongly implied" that claims based on anecdotal evidence would be validated (*id.* at 27), and because they speculate that some possible class members in Israel or in the Brooklyn Holocaust survivor community may have been "biased in favor of joining the settlement" or "naturally inclined to file claims." (*Id.* at 27-28.)[17] Every objection as to the form of notice that Petitioners reiterate here was carefully considered by the District Court and reviewed by the Second Circuit. These courts confirmed that the notice used in this settlement was clear, neutral, and satisfied Rule 23. (SPA-5; SJA-8; SJA-64 at 64; Petition, Appendix A, at 4a ("[T]he record [below] indicates that the notice provided to potential class members satisfied the requirements of due process, [Rule] 23 and *Amchem Products*, 521 U.S. at 620-21.").) Review is wholly unjustified on this quintessentially factual objection.

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[17] Contrary to what Petitioners again argue here (Petition at 27), it is settled that opt-out forms are not required under Rule 23. *See Patrowicz v. Transamerica HomeFirst, Inc.*, 359 F. Supp. 2d 140, 152-53 (D. Conn. 2005); *Mariott v. County of Montgomery*, 228 F.R.D. 133, 133-34 (N.D.N.Y. 2005).

III. PETITIONERS' REMAINING OBJECTIONS DO NOT MERIT REVIEW

Petitioners conclude with a section captioned as if disputing the adequacy of class counsel's representation. (Petition at 28-33.) In fact, it is a repository for unsupportable charges these Petitioners have consistently and unsuccessfully made against ICHEIC and Generali in seeking to dismantle any settlement. None of these baseless and provocative accusations justifies granting review, and all were fully ventilated before the courts below.

First, Petitioners' litany of ICHEIC's alleged "failures" is irrelevant.[18] ICHEIC's performance or features are not at issue here, as Petitioners intimate. (*See* Petition at 25 ("If ICHEIC were presented to a district court . . . no court would approve it.").) There is no logic in the contention that, in not "judging ICHEIC's performance," the District Court failed to protect the interests of absent class members. (*Id.* at 33.) This is all a red herring – no court has been asked to "approve" ICHEIC, and ICHEIC's alleged shortcomings have no bearing on this settlement. The settlement at issue here incorporates valuation and eligibility standards developed in the ICHEIC process

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[18] In a different context, this Court itself, when faced with a barrage of similar arguments challenging the U.S. Executive's choice of ICHEIC as an effective mechanism to resolve Holocaust-era insurance claims, *see Garamendi*, 539 U.S. at 406-12 (2003), noted that "our thoughts on the efficacy of [ICHEIC] versus [litigation] are beside the point, since our business is not to judge the wisdom of the National Government's policy" supporting ICHEIC to the exclusion of litigation. *Id.* at 427.

(that the District Court evaluated and found to be adequate), but the settlement's *implementation* remains entirely under the supervision of the federal court that approved it, as the District Court observed in rejecting these very arguments. (A-564-66; SJA-56 at 45-46.) As noted, thousands the world over benefited from ICHEIC's monumental and unprecedented effort to identify and pay ancient policies.

Petitioners' further objections, masked in derisive phrases such as "phantom rule" or "negative evidence" (Petition at 29-30), were all considered and found wanting by the courts below, despite the support of several *amici* who filed briefs on Petitioners' behalf.[19] Petitioners also continue pressing the provocative notion that Generali "identified" the "Jewish race" of customers

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[19] The expression "phantom rule" was coined by a single appellate arbitrator (charged under ICHEIC rules with an independent and binding review of awards at the request of claimants) who elected to disregard ICHEIC rules and took umbrage at ICHEIC's reasonable attempt to call these rules to his attention. *See* Brief in Opposition to Albert Lewis's *Amicus Curiae* Submission, dated September 14, 2007, filed in the Second Circuit Action. This arbitrator was one of the *amici* below in support of Petitioners' objections. (Petition at 30 n.19.) And no "negative evidence" was used to deny claims; rather reasonable evidentiary rules were adopted by ICHEIC, based on independently audited records, to determine if a Generali policy was (or was not) in effect during a historically-determined "Holocaust Period" in each country and therefore entitled to compensation under ICHEIC rules. *See* Brief in Response to *Amicus Curiae* Brief Filed in Support of Plaintiffs-Appellants, dated August 22, 2007, filed in the Second Circuit Action. Another *amicus* appeared below on Petitioners' behalf to press the "negative evidence" argument as well. (Petition at 30 n.20.)

in its policies, when in fact nothing in two ancient letters from Italian officials on which they rely for this charge (A-450-52) comes close to showing that *Generali* identified any customer by religion, much less that its policies contained information about religion.

In the end, the District Court repeatedly considered each of these factual arguments on ICHEIC's failings (A-564; SJA-48), the standards and processes employed to evaluate claims under this settlement (A-394-95; SJA-48 at 30; SJA-54-55), class counsel's diligence, and Generali's alleged non-disclosures. (A-565; SJA-40 at 11; SJA-44-48.) And based on the record before it, the District Court found them to be "factually inaccurate, speculated without sufficient evidentiary support, or even if true [not a] legal basis to deny approval of the settlement." (A-561; *see also* SJA-64-65 (assessing settlement terms and compensation and weighing the risks of litigation and finding the settlement to be in the best interests of the class, "with the consideration of additional arguments, objections, and reconsideration of the previously made arguments and objections").) The Court of Appeals, likewise found no basis to disapprove the settlement in the same barrage of baseless accusations. (Petition, Appendix A, at 5a (affirming "[h]aving considered all of [these] arguments on appeal and found them to be without merit.").) Petitioners' request for further reconsideration of these factual matters does not warrant review.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Dated: January 16, 2009

Respectfully submitted,

MARCO E. SCHNABL
Counsel of Record
SHVETA KAKAR
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036
(212) 735-3000

PETER SIMSHAUSER
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
One Beacon Street
Boston, MA 02108
(617) 573-4800

Counsel for Respondent
Assicurazioni Generali S.p.A

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In The Supreme Court of the United States

JACK RUBIN, ALEX MOSKOVIC, DAVID MERMELSTEIN, IRENE MERMELSTEIN, FRED TAUCHER, HANS LINDENBAUM, HANNA HARELI and DAVID GRINSTEIN,

Petitioners,

v.

ASSICURAZIONI GENERALI S.P.A. HOLOCAUST INSURANCE LITIGATION, SAMUEL HERSLEY, AGNES HEYMAN, PAOLA OREFFICE KULP and EUGENIA SCHENCKER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION OF RESPONDENTS SAMUEL HERSLEY, AGNES HEYMAN, PAOLA OREFFICE KULP AND EUGENIA SCHENCKER

ROBERT A. SWIFT*
CRAIG W. HILLWIG
KOHN, SWIFT & GRAF, P.C.
One South Broad Street, Suite 2100
Philadelphia, PA 19107
215-238-1700

ELIZABETH J. CABRASER
MORRIS A. RATNER
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
780 Third Avenue, 48th Floor
New York, NY 10017
212-355-9500

ROBERT M. HORKOVICH
LINDA GERSTEL
ANDERSON KILL & OLICK, P.C.
1251 Avenue of the Americas
New York, NY 10020
212-278-1000

NANCY SHER COHEN
REYNOLD L. SIEMENS
PROSKAUER ROSE LLP
2049 Century Park East
32nd Floor
Los Angeles, CA 90067
310-557-2900

Counsel for Respondents Samuel Hersley, Agnes Heyman, Paola Oreffice Kulp and Eugenia Schencker
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

Petitioners are eight objectors who seek to disrupt an historic class action settlement (the "Settlement") of claims brought by Holocaust survivors and their heirs to recover on insurance policies sold by Respondent Assicurazioni Generali S.p.A ("Generali") and related companies. Having no valid claim for relief themselves, and thus no incentive to opt-out, Petitioners would rather deprive these class members, many of whom are aged survivors, from obtaining immediate compensation for these policies.

The challenged Settlement resulted from more than a decade of hard fought litigation and arm's length negotiation, and was reached only after the District Court dismissed plaintiffs' claims based on this Court's decision in *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003) ("*Garamendi*"). The lower courts' application of Rule 23 and this Court's class action precedent was both straightforward and unremarkable. Petitioners do not identify any circuit split, decision on an important federal question, or substantial departure from the usual course of judicial proceedings justifying certiorari review in this case. Their petition for a writ of certiorari ("Petition") should be denied.

COUNTERSTATEMENT OF THE CASE[1]

As this Court recounted in *Garamendi*, reparations for Holocaust victims was an issue deferred for decades due to the Cold War. *Id.* at 403-05. Following German reunification in 1990, numerous class action lawsuits were filed in United States courts against companies who did business in Nazi Germany and in Nazi-occupied areas of Europe. *Id.* at 405. The litigation resulted in countrywide settlements in Switzerland, Germany and Austria and the payment of over $7.5 billion to Holocaust survivors and their heirs. The Settlement with Generali concludes the last of the major Holocaust-related class actions.

Plaintiffs commenced the first class action against Generali in March 1997. *See In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 340 F. Supp. 2d 494, 496-97 n.1 (S.D.N.Y. 2004) (hereinafter "*Generali II*").[2] Plaintiffs alleged that Generali

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[1] References to the Petition and its Appendix are cited as "Pet._" and "Pet.App._," respectively. Materials in the Court of Appeals record are cited as "A_" (joint appendix), "SJA_" (supplemental joint appendix) and "ASA_" (appellees' supplemental appendix).

[2] The Settlement applies to three class actions: *Cornell v. Assicurazioni Generali, S.p.A.*, No. 97 Civ. 2262 (S.D.N.Y.), *Schenker v. Assicurazioni Generali, S.p.A.*, No. 98 Civ. 9186 (S.D.N.Y.), and *Smetana v. Assicurazioni Generali, S.p.A.*, No. 00 Civ. 9413 (S.D.N.Y.). Several other lawsuits were commenced by individuals against Generali throughout the United States, and were transferred to the Southern District of New York for coordinated pretrial proceedings as part of MDL No. 1374, or removed to that district from New York state court. All told,

(Continued on following page)

cooperated with the Nazi regime, often by paying to it the value of life insurance policies purchased by Jews and other persecuted minorities. *Id.* at 496-97. Plaintiffs asserted claims on behalf of a class of Holocaust victims (or their heirs) under state statutes and common law as well as under international law, seeking to recover on Generali policies that either were paid to the Nazi regime or left unpaid after World War II. *Id.*

In August 1998, the parties initially agreed to a $100 million class action settlement conditioned on ratification by Generali's board of directors.[3] That ratification never occurred and as a result the 1998 settlement was aborted.

While the litigation proceeded,[4] Generali negotiated a separate agreement in 2000 with the

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twenty civil actions comprised the MDL proceedings when the District Court dismissed the litigation. *See Generali II*, 340 F. Supp. 2d at 496 n.1 (discussing the makeup of the MDL proceedings). A number of individual plaintiffs excluded themselves from the Settlement to continue their appeals of *Generali II*, which are pending before the Court of Appeals as *Cornell v. Assicurazioni Generali S.p.A.*, No. 05-5602 (2d Cir.).

[3] *See* David Cay Johnston, *Italian Insurer Agrees to Pay $100 Million in Holocaust Suit*, N.Y. TIMES, Aug. 20, 1998, at A8, *available at* 1998 WLNR 3001597.

[4] Generali asserted an unsuccessful motion to dismiss on *forum non-conveniens* and contractual forum selection grounds. *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 349, 355-58 (S.D.N.Y. 2002) (hereinafter "*Generali I*"). Discovery proceeded, and class counsel reviewed and cataloged over 50 file boxes of documents produced by Generali.

International Commission on Holocaust-Era Insurance Claims ("ICHEIC"), a voluntary organization created in 1998 to set standards and process Holocaust insurance claims. *See generally Garamendi*, 539 U.S. at 406-07 (discussing the formation of ICHEIC).[5] That agreement, known as the Rome Agreement, provided that Generali would provide ICHEIC with $100 million to pay Holocaust-Era insurance claims.

In 2003, this Court decided *Garamendi*, holding that a California statute requiring insurers to disclose information about Holocaust-Era insurance policies was preempted because it interfered with the foreign policy of the United States, as embodied in certain Executive Agreements encouraging the voluntary settlement of Holocaust-Era claims. *Garamendi*, 539 U.S. at 425. Generali then moved to dismiss the Holocaust-Era litigation against it based on *Garamendi* and in October 2004 the District Court granted the motion, holding that plaintiffs' claims likewise were preempted. *Generali II*, 340 F. Supp. 2d at

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[5] ICHEIC was formed voluntarily by a number of major European insurers, the insurance commissioners of a number of states (including New York, California, Pennsylvania and others), the National Association of Insurance Commissioners, representative Jewish and Holocaust survivor and restitution organizations, the State of Israel, major European insurance commissioners and observers from the United States Government. It was chaired by former Secretary of State Eagleburger. *Garamendi*, 539 U.S. at 406-07.

507-08. Several plaintiffs, including the Respondent Class Representatives herein, appealed.[6]

During the Summer of 2006, while the appeals were pending, it became apparent that the $100 million that Generali provided to ICHEIC would be insufficient to pay all Generali-related claims, and that a substantial number of validated ICHEIC claims would go unpaid without additional funds. Class Counsel pressed for a new claims process that would attract additional claimants who had not submitted claims through ICHEIC. Class Counsel and Generali negotiated extensively over the next two months, finally executing the Settlement Agreement on August 25, 2006. A52.

Under the terms of the Settlement, Generali committed to (1) pay all validated but unpaid ICHEIC claims and (2) process new claims pursuant to a new program with new deadlines, paying all validated claims.[7] A67-69. The Settlement substantially adopted the eligibility and valuation criteria that ICHEIC developed and used, and which were

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[6] The appeals are pending as *Cornell v. Assicurazioni Generali S.p.A.*, No. 05-5602 (2d Cir.) (docket retrieved from PACER on Jan. 12, 2009). Pursuant to the Settlement Agreement, the Respondent Class Representatives agreed to stay their appeals. The remaining appeals were argued on June 10, 2008.

[7] Since the Settlement was approved, Generali has voluntarily paid out an additional $36 million without awaiting the conclusion of Petitioners' appeal.

supported by the United States Government. A67. *See Garamendi*, 539 U.S. at 407 (discussing the Government's support of ICHEIC). Importantly, the Settlement allowed all claimants whose claims had been denied by ICHEIC to submit a new claim. Administration of the Settlement would be supervised by the District Court. A68. In return, Generali would be released from Holocaust-Era insurance claims by members of the Settlement Class. A65-67.

In October 2006, the District Court granted preliminary approval of the Settlement and authorized dissemination of class notice. A85. The notice was comprehensive and relied upon multiple modes of notice that were successfully utilized in other Holocaust settlements.[8] A88-89, 90-93. These modes included newspaper publication, press releases, outreach and notice to over 8,000 NGOs, and a toll-free phone center. A94-99. An official Settlement website[9] posted the notice, claim form and other relevant information regarding the Settlement. A96-97. Twelve months later, some 50,000 individual class notices were also mailed to potential claimants

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[8] Class Counsel had extensive experience in litigating and managing Holocaust class action litigation and settlement class notice. *See In re Holocaust Victim Assets Litig.*, 424 F.3d 132, 138 (2d Cir. 2005) (describing the notice program), *cert. denied*, 547 U.S. 1206 (2006). Petitioners' counsel represented objectors to that settlement as well. *In re Holocaust Victim Assets Litig.*, 424 F.3d 150, 153 (2d Cir. 2005), *cert. denied*, 547 U.S. 1206 (2006).

[9] http://www.nazierainsurancesettlement.com (last accessed Jan. 6, 2009).

worldwide. SJA18. The worldwide notice program covered 237 countries with notices in 16 different languages. A89.

The response of the Class was overwhelmingly positive. Approximately 50,000 claims were received in the new claims program by the extended deadline of August 20, 2008 against only approximately 400 opt-outs.

Prior to seeking final approval of the Settlement in the District Court, Class Counsel conducted several days of due diligence with Generali personnel and attorneys in Trieste, Italy, in order to confirm the basis for the Settlement, inspect the archival data available to process claims, and evaluate the adequacy of the claim processing group. A191-192. Satisfied that the factual basis for the Settlement was accurate and that Class members' claims have been and will be processed with utmost care and integrity, Class Counsel moved for final approval and certification of the Settlement Class.

The District Court held fairness hearings on January 31 and February 27, 2007. A353, 507. The Petitioners, through their counsel, appeared and objected to the Settlement at each hearing. After the first hearing, the parties agreed to amend the Settlement Agreement to satisfy Petitioners' primary objection that the claim deadline should be extended in anticipation that an archive of World War II concentration camp records, located in Bad Arolsen, Germany, would be opened to the public. A442. At the

second hearing, the District Court denied Petitioners' remaining objections, certified the Settlement Class, and approved the Settlement as fair, reasonable and adequate. A568; Pet.App.17a-23a.

Petitioners appealed the Settlement on several grounds, including the adequacy of class notice, the scope of the released claims, and the typicality and adequacy of representation. Following oral argument, the Court of Appeals remanded to the District Court so that individual mailed notice could be sent. Pet.App.14a-16a.

On remand, Petitioners again objected to the Settlement. The district court conducted a third fairness hearing on January 7, 2008 and heard argument on Petitioners' objections. SJA35. Concluding that the Settlement was "fair, reasonable and adequate," the District Court again approved the Settlement. Pet.App.6a-12a. Following another round of briefing, the Court of Appeals considered the remainder of Petitioners' objections and, finding them meritless, affirmed the judgment. SJA66; Pet.App.1a-5a.

REASONS FOR DENYING THE PETITION

Petitioners do not identify any inter-circuit conflict or raise any important but unsettled federal question for resolution by the Court. Sup. Ct. R. 10. Rather, Petitioners' primary argument appears to be that the Court of Appeals simply misapplied this

Court's prior decisions in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) ("*Amchem*") and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) ("*Ortiz*"). Pet.14-25. This is a meritless argument, and one which does not justify granting the Petition.

Petitioners' remaining arguments consist of minor quibbles over the phrasing of the class notice, and a litany of irrelevant (and often factually unsupported) attacks on the ICHEIC program, Generali's participation in that program, and the adequacy of Class Counsel in obtaining fair and reasonable terms for the Class. None of these secondary arguments, which relate to fact-bound matters reserved to the District Court's discretion, support granting the writ in this case.

I. The Settlement and Settlement Class Raise No Due Process or Rule 23 Problems Under This Court's *Amchem* and *Ortiz* Decisions.

The Settlement Class certified below is a cohesive one that has none of the structural defects that the Court identified in *Amchem* and *Ortiz*. Petitioners fail to identify any intra-class conflict among discrete groups of class members with markedly different types of claims, or for that matter any other conflict that could undermine the typicality of the representative plaintiffs' claims or the adequacy of their representation. Moreover, the Settlement provides for opt-out rights and no funding limits, and therefore no

tensions exist from the need to allocate a limited fund among members of a mandatory class.

The Settlement Class here is a cohesive one in which all Class members assert the same claim – non-payment of insurance policies in force between 1920 and 1945 sold by Generali and affiliated companies. SJA32-33. The three class action complaints asserted claims as to this same group of policies, and the release is confined to those policies and the allegations of the complaints. A65. In short, there is complete congruity between the claims asserted, the release given and the entitlement to compensation. Further, all Class member claims are subject to the same eligibility and valuation criteria.

The Settlement herein exhibits none of the characteristics that the Court disapproved in *Amchem* and *Ortiz*. In those cases, the settlement classes included not only "present injury" claimants who had ripe tort claims for cancer and other asbestos-related disease, but also "exposure only" claimants who might develop such diseases in the future, and whose claims were premised on theories of liability that had mixed acceptance from state to state, such as medical monitoring, "pleural thickening," increased risk, and fear of future injury. *Amchem*, 512 U.S. at 604.

The Court in *Amchem* held that common issues did not predominate because of the "greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the significance of those uncommon questions" to

their respective claims. *Id.* at 624. The Court also criticized the lack of subclasses or other structural safeguards in the settlement to protect the diverse interests of the subgroups of class members, and held that conflicts between the present-injury class representatives and the "exposure only" class members they sought to represent rendered the representation inadequate under Rule 23(a)(4). *Id.* at 626-27.

In *Ortiz*, the Court considered a "limited fund" mandatory class settlement pursuant to Rule 23(b)(1)(B). As relevant here, the Court criticized the settlement for treating present and future claimants the same for purposes of allocating the limited fund, while carving out so-called "inventory plaintiffs" represented by class counsel in pending individual suits, despite the conflicting incentives and diverse interests that these groups had. The Court held that the class as defined, like the class in *Amchem*, lacked subclasses and other structural protections to prevent inequities in allocating the limited fund among the competing groups of claimants. *Ortiz*, 527 U.S. at 856-58.

In short, the Settlement Class in this case exhibits none of the internecine conflicts or structural flaws that doomed the "sprawling" class settlements in *Amchem* and *Ortiz*.

A. The Settlement Does Not Release Claims for "No Compensation" and Raises No Issue Under *Amchem* Justifying Certiorari.

The Settlement provides every Class member with the same opportunity to submit a claim for payment of an insurance policy. Petitioners seem to concede this. Pet.19. The Settlement is therefore nothing like the settlement vacated in *Amchem*, which singled out the "exposure only" plaintiffs for no compensation. Pet.14-21.

At bottom, Petitioners' complaint is *not* that certain categories of Class members are releasing claims for no compensation. These "categories" are illusory given the cohesiveness of the Class, the identity of the claims asserted, and their congruity with the claims released.[10] Every Class member will have the same meaningful opportunity to submit a claim for payment based on the same relaxed eligibility standards, without the myriad difficulties of having to prove the existence of a fully paid up policy issued 40 years ago and, importantly, without the risk that their claims will be foreclosed altogether through

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[10] Petitioners identify three "categories" of Class members who, Petitioners claim, are being forced to release claims without any compensation: Class members who previously submitted claims to ICHEIC but were denied, Class members who are unaware of their potential class membership, and Class members who purchased policies from Generali subsidiaries and affiliates.

the application of *Garamendi*. That is the primary benefit accruing to each Class member.

Stripped of their hyperbole and mischaracterizations, Petitioners' arguments are nothing more than the recognition that some Class members will be unable to establish eligibility for compensation in the claims process. But Rule 23(b)(3) class action settlements routinely employ eligibility criteria for claims administration, with the consequence that some class members will be unable to meet the required showing.

To be sure, the circumstances of World War II and the Holocaust, the intervening Cold War, and the passage of time are factors that complicate the eligibility determinations being made under the Settlement. The procedures and presumptions developed during the ICHEIC distribution – now substantially employed in this Settlement – address these concerns through relaxed eligibility standards under which Class members can recover even if they have no information about Generali policies owned by them or their forebears. These procedures are the same ones that the United States Government so strongly supported, as recounted in *Garamendi*. 539 U.S. at 407, 422-23.

The District Court considered all of these factors in concluding that the Settlement was fair, reasonable, and adequate. The Court of Appeals found no abuse of discretion, and the decision below affords no basis for granting the Petition.

B. The Settlement's Implementation of ICHEIC Eligibility and Valuation Standards Does Not Implicate *Ortiz* Concerns or Justify Certiorari.

This is not a "limited fund" case. Petitioners do not argue otherwise, nor could they – the District Court certified a Rule 23(b)(3) class for a "claims made" settlement in which Generali's maximum exposure is limited only by the number of valid claims submitted. With minor exceptions,[11] every validated claim will be paid at present value according to the Settlement's valuation formulas. Nevertheless, Petitioners inexplicably criticize the Settlement at length as if it were a limited fund case, arguing that the claims process must satisfy this Court's criteria for Rule 23(b)(1)(B) class settlements. Pet.21-25 (citing *Ortiz*, 527 U.S. at 839-40).

Petitioners' argument fails in its premise because any comparison to the settlement in *Ortiz* is untenable on its face.[12] This is not a case where the settlement pits different groups of claimants with competing interests against each other in a

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[11] For example, if a loan had been made to the insured on a policy, there will be a deduction.

[12] While Generali's maximum exposure to ICHEIC claims initially was capped at $100 million, it was not a "limited fund" in the Rule 23(b)(1)(B) sense because the $100 million was not allocated among the universe of all validated claims. Rather, validated claims were paid at full value (under ICHEIC formulas) until the $100 million was exhausted.

mandatory class with respect to the allocation of a limited fund. *Ortiz*, 527 U.S. at 857-59. And given that the Settlement provides opt-out rights, Petitioners' Seventh Amendment argument (Pet.25) is frivolous. *See Ortiz*, 527 U.S. 845-46 (stating that "*a mandatory class* followed by settlement of its action for money damages obviously implicates the Seventh Amendment") (emphasis added).

Disregarding Petitioners' misplaced reliance on *Ortiz*, Petitioners' real complaint seems to be that the Settlement makes compromises and judgments with respect to the values paid to successful claimants depending upon, *inter alia*, the countries and currencies (some of which are now defunct) in which the policies were issued. *See* Pet.23-24. But that is the nature of Settlement, and the lower courts took these compromises into account in finding the Settlement fair, reasonable and adequate.

II. Petitioners' Class Notice Arguments Are Meritless.

Petitioners identify no circuit split or legal holding by the Court of Appeals as to the content of the class notice that would justify granting the Petition. Nor do Petitioners identify any structural "[i]mpediments to the provision of adequate notice" of the type that concerned the Court in *Amchem*. 521 U.S. at 628.

To pass muster under the Due Process Clause, a class notice need only be "'reasonably calculated,

under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Phillips Petroleum v. Shutts*, 472 U.S. 797, 812 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). Rule 23 accords district courts with substantial discretion in formulating the content of a settlement notice. *See, e.g., Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 114 (2d Cir.) ("There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements"), *cert. denied*, 544 U.S. 1044 (2005). A settlement class notice need only "'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with [the] proceedings.'" *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 122 (8th Cir.) (citations omitted), *cert. denied*, 423 U.S. 864 (1975). Notice is "'adequate if it may be understood by the average class member.'" *Wal-Mart Stores*, 396 F.3d at 114 (citations omitted).

The crux of Petitioners' argument is not that the notice omitted or misrepresented any material information about the Settlement. Rather, the Petitioners nit-pick the notice, offering speculative projections about what "impressions" Class members might have and subjective spin concerning what the notice "implies." Pet.26-27. Given the substantial discretion accorded the District Court over the content of the class notice, the Court of Appeals summarily and properly rejected these arguments. More importantly,

they do not justify the grant of the Petition in this case.

III. Petitioners' Remaining Contentions Are Meritless.

In the last section of the their brief, Petitioners offer a litany of criticism concerning the history of ICHEIC and Generali's participation in it, making ominous sounding accusations concerning "phantom rules", pressured arbitrators, failed auditors, and "commonly ignored" standards of proof. Pet.28-30. Moreover, Petitioners accuse the parties of misrepresenting that history to the District Court to obtain approval of the Settlement, and suggest that the District Court abandoned its obligation to protect the absent Class members. These are serious charges – ones that District Court and the Court of Appeals found to be meritless.

As relevant here, however, these ICHEIC-related arguments do not support granting the Petition because the Settlement is supervised by the District Court. ICHEIC ceased functioning in 2006. Whether or not ICHEIC performed as advertised has no bearing on whether *this* court-supervised Settlement will provide a fair, transparent and accountable claims process.

In sum, Petitioners merely ask the Court to speculate about hypothetical future disputes over claims administration that may never occur, presenting no concrete controversy for this Court to consider.

Cf. Nat'l Park Hospitality Ass'n v. Dept. of Interior, 538 U.S. 803, 807-08 (2003) (stating that ripeness is a doctrine designed to prevent judicial interference with administrative proceedings until a decision has been finalized). Any complaints about the actual conduct of claims administration can be addressed to the District Court, which has authority under the Settlement in the first instance to resolve problems on the basis of a full factual record as they arise.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that the Court deny the Petition.

Respectfully submitted,

ROBERT A. SWIFT
Counsel of Record
CRAIG W. HILLWIG
KOHN, SWIFT & GRAF, P.C.
One South Broad Street
Suite 2100
Philadelphia, PA 19107
215-238-1700

Counsel for Respondents
Samuel Hersley, Agnes Heyman, Paola Oreffice Kulp and Eugenia Schencker

No. 08-780

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IN THE

Supreme Court of the United States

JACK RUBIN, ALEX MOSKOVIC, DAVID MERMELSTEIN, IRENE MERMELSTEIN, FRED TAUCHER, HANS LINDENBAUM, HANNA HARELI, and DAVID GRINSTEIN,

Petitioners,

v.

ASSICURAZIONI GENERALI S.p.A. HOLOCAUST INSURANCE LITIGATION, SAMUEL HERSLY, AGNES HEYMAN, PAOLA OREFFICE KULP, and EUGENIA SCHENCKER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

SAMUEL J. DUBBIN, P.A.
DUBBIN & KRAVETZ, LLP
1200 Anastasia Avenue
Suite 300
Coral Gables, Florida 33134
Telephone: (305) 357-9004
Facsimile: (305) 371-4701

Attorneys for Petitioners

221140

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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According to the decision below, if a putative class action has been dismissed, then the district court may, while an appeal of that dismissal is pending, certify a settlement class (1) without requiring the settling plaintiffs to establish the requirements of commonality, typicality, predominance, superiority, and adequacy of representation under Rule 23, and (2) imposing releases on the vast majority of class members even though they have no opportunity to obtain a monetary benefit from the settlement. It holds that if a settlement seems "fair and reasonable," the requirements of Rule 23 and due process are irrelevant – precisely the outcome condemned by *Amchem Products, Inc., v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fireboard Corp.*, 527 U.S. 815 (1999). This Court should grant certiorari because the decision below represents a fundamental retrenchment from this Court's *Amchem* and *Ortiz* precedents. It not only violates the rights of tens of thousands of class members, but invites further abuse of the class action mechanism.

Other than a general statement that the Court "determined that this action meets all the prerequisites of a Rule 23(a), and (b)(3) and (c) of the Federal Rules of Civil Procedure, including numerosity, predominance of common issues, and typicality, and that Plaintiffs and their counsel are adequate representatives of the Settlement Class," the District Court did not require the settling plaintiffs to actually establish those requirements. The Court simply approved the settlement because it believed it was "fair." It stated:

> I still find that this settlement is a fair and reasonable and adequate settlement for this

> case. As we all start out with, Judge Mukasey's previous dismissal of this case cannot be ignored. I think that we all recognize that it means that those who do not participate in the settlement by opting out will see themselves no court-ordered recovery; that no court-ordered recovery would be available unless that decision is reversed by the Second Circuit Court of Appeals and a claim can be substantiated in a court of law.
>
> . . . .
>
> I believe that it is still on the record before me reasonable for plaintiffs to conclude, and a vast majority of the plaintiffs, and the representatives of plaintiffs and lead counsel to conclude that this may likely be the last best hope for some substantial monetary recovery given the reasonable terms of this settlement and the defendant's willingness to participate and fund this agreement.

SJA-64, 65.

The settlement and decisions below undercut the two pillars of *Amchem* and *Ortiz,* which forbid precisely what was done below:

> [T]he standards set for the protection of absent class members serve to inhibit appraisals of the chancellor's foot-kind, class certifications dependent upon the court's

> gestalt or overarching impression of the settlement's fairness.
>
> . . . .
>
> Federal courts, in any case, lack authority to substitute for Rule 23's certification criteria a standard never adopted – that if a settlement is "fair," then certification is proper.

Amchem, 521 U.S. at 621-22.

Rule 23 Requirements Not Established

The class is defined broadly as *every* Holocaust victim who was a party to any insurance policy sold by Generali or its affiliates or subsidiaries, or any beneficiary or heir of such a person. A-58. The settlement had two categories of benefits: (1) payments on pending claims, i.e. made within the original ICHEIC deadline but not processed before Generali had paid out $100 million, and (2) acceptance of "new claims," originally defined as claims not filed before the original ICHEIC deadline. The parties expanded the definition of "new claims" to include previously denied ICHEIC claims, though they stood no chance of validation without new evidence. A- 511-12. New claims were to be matched against the same Generali Policy Information Center (PIC) database used in ICHEIC. A- 61.

It appears that all or nearly all of the money Generali will pay in the settlement will inure to the benefit of the first group, the very limited group of ICHEIC claimants

whose claims were pending. None of the four named settling plaintiffs were in the first group.

The second group of alleged beneficiaries, class members who could file "new claims," is obviously extremely large, theoretically the rest of the class. But within this group there are tens of thousands of class members who have *no chance* to benefit from the settlement, those: (1) whose ICHEIC claims were previously denied for any of the bogus reasons identified by the media, Congress, and other critics; (2) whose family member bought a policy from one of Generali's eighty-plus subsidiaries or affiliates, whose policy holder information was not published by ICHEIC or included in the settlement database; and (3) who had no idea that a family member owned a Generali policy and never contacted Generali or ICHEIC. They are excluded from any opportunity to benefit from the settlement but would be bound by the releases of which Petitioners have complained. Petition, at 14-21.[1]

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[1] Tellingly, the settling parties attempted to waive the due process rights of class members who had no notice of a possible claim against Generali:

> "Releasors hereby expressly waive and release . . . any and all provisions, rights, and benefits conferred by Section 1542 of the California Civil Code, which reads: . . . 'A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release,'" or any similar law.

A-66-67.

The District Court and Circuit Court ignored the disparate impact of the settlement on this vast group of class members. In so doing, they failed to engage in the required Rule 23(a) and (b)(3) analysis of the commonality, typicality, predominance, superiority, and adequacy of the named plaintiffs necessary for certification of the class, and also ignored the Constitutional and Rules Enabling Act requirements that forbid imposition of releases on class members for no consideration. Petition, at 17; *Amchem*, 521 U.S. at 612, 614-15.; Ortiz, 527 U.S. at 845. While *Amchem* calls for "undiluted, even heightened attention" to these prerequisites for a Rule 23(b)(3) settlement, 521 U.S. at 619, the district court below did just the opposite – it failed to analyze them because it believed the settlement was the best that could be achieved for the small number who might benefit. The Court of Appeals adopted this view.

In addition to *Amchem* and *Ortiz* , these decisions conflict with the clear authority of this Court and other Circuit Courts of Appeal that impose the burden of satisfying the elements of Rule 23 on the settling parties. *See, e.g., General Telephone Co. v. Falcon*, 457 U.S. 147, 160 (1982) ("Actual, not presumed, conformance with Rule 23(a) remains . . . indispensable.); *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246 (11th Cir. 2003) ("the party seeking certification bears the burden of establishing all elements of Rule 23(a)"); *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003) (reviewing court must pay "undiluted, even heightened attention" to class certification requirements in settlement).

Corrections to Respondents' Representations of the Record

To cloud the issues and sidestep the due process and Rule 23 violations in the settlement, Generali and Class Counsel obscure or misrepresent the record, or the history of the litigation.

First, Respondents obscure the details of the settlement to conceal the fact that actual benefits to the class are minimal or nonexistent. Petitioners showed that Generali's original ICHEIC "side letter" promising to pay claims in excess of $100 million renders that first category of benefit illusory consideration for a settlement. Petition at 9; A-615. *Maynard v. Durham & Southern Ry.*, 365 U.S. 160, 163 (1961) (payment of wages to which employee was entitled does not support consideration for release); *Norman v. McKee*, 291 F.Supp. 29 (ND.Cal.), *aff'd* 431 F.2d 769 (9th Cir. 1970) (agreement to do something already required by regulators not benefit to class).

Respondents focus on payments to this questionable category of "pending claims" to obscure the fact that benefits to the remainder of the class will be minimal at best. In January 2008, the settling parties told the District Court that $35 million had already been paid since the August 2006 agreement to the first category of claimants, i.e. those whose ICHEIC claims had been pending. SJA-38. In its certiorari response of December 15, 2008, Generali states that "in deference to the age of many applicants," it has "already processed some 14,000 applications and paid more than $36 million despite the lack of finality." By refusing to distinguish between payments to pending claimants (those

submitted before ICHEIC's December 31, 2003 deadline) and payments on "new claims" under the settlement, the settling parties are concealing facts which, if revealed, would enable the courts to properly evaluate what consideration is being paid, and to whom, and at what cost. The courts below refused to hold Respondents to their burden of proving the settlement is fair, reasonable, and adequate. *In re General Motors Corp. Interchange Litig.*, 594 F.2d 1106, 1126, note 30 (7th Cir. 1979) ("although the proponents of any class settlement always bear the burden of proof on the issue of fairness . . . proponents who improperly negotiate a settlement should bear the heavier burden of establishing fairness by clear and convincing evidence.")

So it is plain that Generali's payment of some $35 million to ICHEIC claimants whose ICHEIC claims were "pending" at the time of the settlement offers virtually no benefits to the class as a whole, leaving the "new claims" process (which excludes broad categories of class members as noted above) as the supposed quid pro quo for the settlement. Then, Generali's promise to two Congressional committees that it would continue to process any "new claims" notwithstanding the ICHEIC deadlines or the settlement deadlines, in order to forestall Federal legislation supporting claimants, made the "bargained-for" releases totally *unnecessary* and compounded the illegality of the deal. *In re Matzo Food Prod.*, 156 F.R.D. 600 (D.N.J. 1994) (rejecting proposed class settlement because defendant already distributed $1.8 million worth of matzo to charities, i.e. the entire consideration under the settlement, which only left attorneys fees in the case.)

In response, Generali makes the shocking claim that its corporate commitment two Congressional committees to continue to process new claims using ICHEIC "standards" no matter what should be *ignored* by this Court on the question of the validity of the settlement. Generali Brief, at 7-8, note 7. It unconscionable for Generali to ask this Court to leave in place its settlement windfall by suggesting its representations to Congress were simply a ploy to avoid the immediate threat of Federal legislation to overturn the court decisions immunizing the company.

On May 8, 2008, Generali wrote the following to the Senate Foreign Affairs Committee:

> Our purpose in writing is to reaffirm Generali's decade-long commitment – which is ongoing and will continue in the future – to resolving claims by Holocaust victims and their heirs. . . .
>
> Generali has conscientiously processed, and paid, claims by Holocaust victims or their heirs on its policies that were in force during the Holocaust era. As recently as February of this year, we reaffirmed our commitment voluntarily to continue processing claims in the future, even after the August 2008 deadline passes for submitting the last possible claims under the class action settlement. The commitment was communicated to Representative Frank, and we continue to stand by it.

Letter from Assicurazioni Generali, S.p.A., to the Honorable Bill Nelson and Norm Coleman, May 8, 2008.

On June 10, 2008, during the Second Circuit argument on the Mukasey dismissal that precipitated the class settlement, one panel member asked Generali's counsel the following question: "Stuart Eizenstat testified earlier this year that since ICHEIC was completed, each insurance company that participates has agreed to continue to process claims that could have been submitted during the ICHEIC process. . . . Is that correct? Generali's counsel answered: "Yes, that is correct." Transcript of Oral Argument in *In re Assicurazioni Generali, S.p.A. Holocaust Insurance Litig.*, Case No. 05-5602-cv, June 10, 2008, at 77-78.

Generali's current duplicity in this Court is not only troubling, it is ineffective. The company's analogy to *Frazier v. American Airlines, Inc.*, 434 F.Supp.2d 279, 287 (D.Del. 2006), *aff'd* 229 Fed. Appx. 171 (3d Cir. 2007) is unavailing because Petitioners are not attempting to enforce a "promise" such as the one asserted by former TWA employees in that case. Petitioners' rights as class members should never have been compromised because that was the only way *others* might get paid. But Petitioners and other absent class members should certainly not involuntarily be bound by the settlement when Generali has subsequently conceded – to Congress and the Courts – that the *quid pro quo* for the class settlement is actually superfluous.

Next, Generali misrepresents the overlap between class members' claims and this Court's decision in *American Insurance Association, Inc., v. Garamendi*,

539 U.S. 396 (2003). It says the Court struck "state legislation designed to promote" litigation such as these suits against Generali. Generali Brief at 2. This is inaccurate. The vast majority of claims asserted against Generali allege state common law contract and tort causes of action and general consumer protection laws, not Holocaust statutes. The complaints of the four named settling plaintiffs did not raise *any* claims under any "Holocaust statute." Appendix in Appeal No. 05-5602, at 167-216, 271-298.

Further, the issues before the Court in *Garamendi* did not involve any survivors' or heirs' actual claims for relief. *Garamendi* struck down a California statute whose *disclosure* requirements conflicted with the ICHEIC disclosure standards that German companies agreed to follow in the U.S.-Germany Executive Agreement. But as Justice Ginsburg noted, "[t]he Court refers, . . . to a number of other California statutory provisions enabling the litigation of Holocaust-era insurance claims in California courts. Those provisions, it bears emphasis, are not at issue here. The HVIRA imposes no duty to pay any claim, nor does it authorize litigation on any claim. It mandates only information *disclosure*, and our assessment of the HVIRA is properly confined to that requirement alone." 539 U.S. at 434-35 (Ginsburg, J., dissenting) (emphasis in original). According to Petitioner's counsel in oral argument: "[W]e're not dealing in this case with claims by individuals. We're dealing with actions by a State," and "[w]e're not dealing here, to begin with, Justice Ginsburg, with claims by individuals." Transcript of Oral Argument, 2003 WL 21015147, at *7, *8.

Finally, Respondents also misrepresent, or certainly exaggerate, the extent of the U.S. government's opposition to survivors' actions against Generali. Generali Brief at 3, note 4. Generali argues "the U.S. government has confirmed that litigation of Plaintiffs' claims is inconsistent with the Government's policy to resolve Holocaust-related disputes through negotiation," and criticizes Petitioners' characterization of the U.S. government position as "ambiguous." *Id.*

In the Second Circuit oral argument on the Mukasey decision, the Court queried the parties about the record showing the U.S. government had *never* recognized any foreign policy interest in litigation against Generali, an Italian company with no Executive Agreement with the United States. The Court initiated an inquiry to the State Department on that subject, which was answered by a "letter brief" from the Department of Justice (DOJ) in October 2008.

DOJ's 2008 letter brief does not call for dismissal of Plaintiffs' cases against Generali. It states: "The United States takes no position on whether plaintiffs' claims are preempted by its foreign policy in light of . . . *Garamendi*, except to the extent that these claims arise under state statutes such as the California Holocaust Victims Insurance Relief Act (HVIRA), . . ." DOJ Letter Brief, at 1-2. As noted above, nearly all of the claims that were asserted against Generali arose under state common law contract and tort theories and general consumer protection statutes, not Holocaust specific statutes.

Yet in the same 2008 letter brief, DOJ also makes the sweeping statements that "it would be in the foreign policy interests of the United States that ICHEIC be regarded as the exclusive forum for resolution of insurance claims against companies like Generali that participated in the ICHEIC process;" and "it is contrary to settled United States foreign policy for plaintiffs' claims to be adjudicated in the courts of the United States." DOJ Letter Brief, at 9-10. So if the U.S. government position is not "ambiguous," it is certainly not as definitive as Generali suggests.

To further roil the issue, to the extent DOJ's 2008 brief suggests any opposition to Holocaust survivors' litigation against Generali, it conflicts with the position taken by the United States in 2000, immediately after President Clinton singed the Executive Agreement with Germany. At that time, DOJ opposed California's statutory disclosure requirements, but solidly reaffirmed survivors' *litigation* rights:

> — the United States "has not undertaken a duty to achieve legal peace for German companies against state litigation and regulatory action."
>
> — "the Foundation Agreement itself does not preclude individuals from filing suit on their insurance policies in court. . . ."
>
> — the Agreement does not "mandate that individual policyholders or beneficiaries bring their claims in ICHEIC."

> — the American Insurance Association (AIA) "is mistaken in asserting that the Foundation Agreement is in 'direct conflict' with California law, if by this AIA means to suggest that the Agreement by its terms preempts the California statute."
>
> — the District Court "overestimated the Agreement's ultimate legal effect when it predicted that the Agreement would make the Foundation an 'exclusive remedy' as a matter of U.S. law."

Brief for Amicus Curiae the United States of America in Support of Affirmance in *Gerling Global Reinsurance Corp. v. Kelso*, Case No. 00-16163, in the United States Court of Appeals for the Ninth Circuit, at 7-9.

Conclusion

Petitioners therefore respectfully urge the Court to issue a writ of certiorari and reverse the decision below.

Respectfully submitted,

SAMUEL J. DUBBIN, P.A.
DUBBIN & KRAVETZ, LLP
1200 Anastasia Avenue
Suite 300
Coral Gables, Florida 33134
Telephone: (305) 357-9004
Facsimile: (305) 371-4701

Attorneys for Petitioners